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Supreme Court, U.S.
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In the
Supreme Court of the United States

MARY J. CLEMENT,
Petitioner,

v.

MONTANA DEPARTMENT OF
LABOR AND INDUSTRY,
Respondent.

*On Petition for Writ of Certiorari to the
Supreme Court of Montana*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the Montana Supreme Court that the proceedings upon which the Respondent revoked the Petitioner's Montana license as a clinical professional counselor comported with due process conflicts with this Court's decisions as to the minimal constitutional requirements for procedural due process.

II. Whether the decision of the Montana Supreme Court that the statutes and regulations under which the Petitioner was charged with professional misconduct and under which her license as a clinical professional counselor was revoked were not unconstitutionally vague conflicts with this Court's decisions as to when a statute is unconstitutional due to vagueness.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

Clement v. Mont. Dep't of Labor & Indus., 2008 MT 388N, 2008 WL 4927020

STATEMENT OF THE BASIS FOR JURISDICTION

The Montana Supreme Court entered the judgment sought to be reviewed on November 18, 2008. Jurisdiction to review, on a writ of certiorari, the Montana Supreme Court's judgment is conferred upon the United States Supreme Court by 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

1. Mont. Code Ann. § 37-1-316
2. Mont. Admin. R. 24.219.804
3. Mont. Admin. R. 24.219.2305

STATEMENT OF THE CASE

Raising of Federal Questions

The Respondent initiated this case by the commencement of administrative disciplinary proceedings against the Petitioner. The Respondent sought revocation of the Petitioner's Montana license as a clinical professional counselor based upon several allegations of professional misconduct. The Petitioner raised the question of the violation of her federal constitutional right to procedural due process in her

Petition for Judicial Review filed in the Montana District Court (A-83-85), and in a Brief in Support of Judicial Review filed by the Petitioner in that court (A-107-115). This question was also raised in the Petitioner's Brief in Opposition to the Respondent's Motion for Summary Judgment (A-197-204), and in the Respondent's argument to the district court at the October 30, 2007 hearing in this matter (A-122). The Petitioner again addressed this question in her initial and reply briefs on appeal to the Montana Supreme Court. (A-235-238, A-262-263.) In its brief to the Montana Supreme Court, the Respondent discussed the issue of whether the Petitioner was afforded procedural due process as required by the United States Constitution. (A-143-146.)

In its Brief in Support of Motion for Summary Judgment, the Respondent addressed the issue of the vagueness of the statutes and regulations under which the Petitioner was charged, within the standards imposed by the United States Constitution. (See A-170-172.) This question was also raised in the Petitioner's Brief in Opposition to the Respondent's Motion for Summary Judgment (A-204-205), and in the Petitioner's Brief in Support of Judicial Review filed in the district court (A-116-117). The Petitioner raised these issues again in her initial and reply briefs on appeal to the Montana Supreme Court. (A-226-235.) In its brief to the Montana Supreme Court, the Respondent discussed the issue of whether the statutes and regulations under which the Petitioner was charged were unconstitutionally vague under the Fourteenth Amendment to the United States Constitution. (A-134-143.)

After a trial, the district court entered judgment for the Respondent, affirming the Respondent's administrative revocation of the Petitioner's professional license. The Montana Supreme Court affirmed the judgment of the district court.

Facts

In November 2003, acting on a complaint received from B.H. and S.H., two of the Petitioner's patients, the Respondent commenced disciplinary proceedings against the Petitioner. The case was initially referred to a Screening Panel, and was then transferred to a Hearing Examiner. A four-day contested-case hearing was conducted in August 2006. In December 2006, the Hearing Examiner submitted his Proposed Findings of Fact, Conclusions of Law, and Recommended Order. (A-17.) The Hearing Examiner recommended that the Petitioner's license as a clinical professional counselor be revoked for unprofessional conduct on several grounds: (1) knowingly billing for counseling services provided to B.H. and S.H. on dates the Petitioner did not provide services, (2) retaliating against B.H. and S.H. for filing their complaint by sending an unsolicited letter to the Social Security Administration asserting that B.H. was a malingerer, (3) engaging in improper dual relationships with B.H. and S.H., (4) counseling B.H. and S.H. in front of third parties, and (5) advertising on her Tennessee website that "swimming with the dolphins" is therapeutic. (A-30-37.) On March 26, 2007, the Respondent adopted the recommended order in its entirety. (A-40-42.)

The Petitioner filed a Petition for Judicial Review in the district court. The Respondent filed a motion for summary judgment in the district court, which the court denied. The parties then filed briefs in support of and in opposition to the Petitioner's Petition for Judicial Review. The district court conducted a hearing on October 20, 2007, at which the parties presented their arguments.

On January 11, 2008, the district court affirmed the Respondent's final order adopting the Hearing Examiner's recommendation of revocation. (A-62.) The court concluded specifically (1) that the Petitioner was given ample warning of what conduct was prohibited, and was adequately provided with the materials submitted to the Screening Panel; (2) that the Petitioner committed billing fraud based upon (a) her use of the Homebuilder Model of counseling, which, the court found, blurred the relationship between professional and personal activities and permitted billing for occasions when no counseling took place, (b) the Petitioner's retaliation against B.H. for her filing of a complaint, and (c) the Petitioner's attempt to have her clients sign a declaration ¹ to validate her billing practices; (3) that the Petitioner's use of the Homebuilder Model created an improper dual relationship; (4) that the Petitioner inappropriately provided counseling to B.H. in front of

¹The declaration was mandated by the court in the Petitioner's separate action against B.H. and S.H. for unpaid telephone counseling, pursuant to the district court's order to mediate or to settle.

third parties; and (5) that the Petitioner's website contained false advertising. (A-58-62.) The Petitioner appealed the district court's judgment to the Montana Supreme Court. The Montana Supreme Court affirmed the judgment of the district court.

The Petitioner professionally met B.H. in February 2001, and her husband, S.H., in September 2001. The Petitioner was engaged to counsel B.H. and S.H. on a variety of personal issues. The counseling occurred in the Petitioner's office, in the clients' home, and at other locations where problems arose. Such counseling was necessary due to crises being experienced by B.H. and S.H., as defined by the clients or the clients' psychiatrist, Dr. Kenneth Olson. The Petitioner terminated the counseling relationship when she moved to Tennessee at the end of December 2001. B.H. reestablished the relationship by calling the Petitioner in Tennessee to tell the Petitioner that B.H. had attempted suicide. The Petitioner worked with both B.H. and S.H. in March and April 2002, and then returned to Tennessee, where B.H. maintained the counseling relationship through telephone contacts. During late June, July, and through mid-August 2002, the Petitioner counseled B.H. and S.H. with respect to fights, threats of divorce, and other crises, while helping the clients regain control over their deplorable living conditions and dilapidated house. The counseling relationship ended with the completion of the goals of treatment in August 2002, and no future appointments were made by the clients. B.H. reestablished counseling services for a week in September 2002, and then again in late October 2002, after she had begun a job as a ranch cook.

The complaint filed with the Respondent by B.H. and S.H. was based upon two major concerns: (1) billing Blue Cross and Blue Shield of Montana ("BCBSMT") for overtime in counseling sessions with reference to dates other than when the services were rendered (a practice called "carry-over billing"), and (2) charging B.H. and S.H. for telephone counseling not covered by BCBSMT, under circumstances in which B.H. telephoned the Petitioner from Montana and reestablished the terminated counseling relationship with the Petitioner, after the Petitioner had permanently moved to Tennessee in late December 2001. B.H. and S.H. filed their complaint against the Petitioner just before they were to appear in Justice Court on November 17, 2003, in a case in which the Petitioner sought to recover payment from B.H. and S.H. for the telephone-counseling services not covered by BCBSMT.

The provider contract between BCBSMT and the Petitioner, pursuant to which the Petitioner furnished the counseling services to B.H. and S.H., was silent as to a provider's entitlement to overtime compensation for sessions necessarily running longer than the seventy-five minutes established by BCBSMT Code 90808. BCBSMT admitted its lack of knowledge about the use of what it deemed the "22 modifier" for overtime compensation, and stated that the Petitioner was the first counselor to inquire about its use. (A-280-281.) The Petitioner was never informed that she should not employ carry-over billing for sessions which were required to run longer than the allotted time established by BCBSMT's billing codes. (A-285-286, A-508.)

On November 19, 2003, the Respondent furnished the Petitioner with notice, by certified mail, of the complaint filed by B.H. and S.H. On December 1, 2003, the Petitioner transmitted materials to the Respondent responsive to the complaint. On July 26, 2004, BCBSMT submitted voluminous materials to the Screening Panel. BCBSMT exerts substantial influence over the Respondent's relations with Montana licensees. When BCBSMT alleges that it is owed money by a licensee with respect to a coverage matter, BCBSMT attempts to collect the asserted debt through the Respondent and the Respondent's authority over licensees, rather than proceeding directly against a licensee. Under such circumstances, BCBSMT drives the process of disciplinary proceedings instituted by the Respondent against licensees.

An investigator for the Respondent called the Petitioner and asked for additional information to provide to the Screening Panel. The Petitioner was not given an interview. The Petitioner sent the requested materials on August 22, 2004. The Petitioner was unaware that BCBSMT had already furnished materials to the Screening Panel, because BCBSMT had failed to respond to an April 2004 letter from the Petitioner requesting more information on some of the statements made in a March 2004 letter from BCBSMT to the Petitioner. (A-289-293.) The Screening Panel met in September 2004, without permitting the Petitioner to be heard. The Petitioner then became aware that the Respondent possessed information that was being used against her, which she could have refuted with documentation if she had

she been given notice of the issues and an opportunity to be heard.

Following the Screening Panel's meeting, the Respondent alleged twenty-seven facts, with five charges set forth under Mont. Code Ann. § 37-1-316, one charge under § 37-22-301, and six charges under Mont. Admin. R. 24.219.804, the Code of Ethics for professional counselors. False advertising was listed as a charge under § 37-1-316 and Rule 24.219.804, but the charges were not connected to specific facts, so the Petitioner had no notice of what issues were to be addressed. The charges included an allegation that the Petitioner had billed for counseling services on dates when she provided no such services. Regarding this charge, the record contains testimony from experts in the field of counseling explaining that the Petitioner did provide services on the dates at issue, because a counselor's services can and should be furnished at locations and under circumstances where they are needed by the client. (A-300-302.) These services were provided on an occasion when the Petitioner drove B.H. to a Staples office supply store in Bozeman (July 2002), when the Petitioner took B.H. to a used furniture store to inquire about a recliner for B.H.'s home (July 2002), when B.H. drove the Petitioner to pick up a car from another person (October 2002), and when the Petitioner was working in the same location as B.H. and B.H. approached the Petitioner in the Petitioner's office on a daily basis (October 2002). At each of these times, B.H. demanded that the Petitioner provide counseling, including the discussion of factual background pertinent to matters directly bearing upon B.H.'s well-being. The Respondent relied upon B.H.'s

allegations, which were unsupported by facts. Moreover, all these counseling services were rendered as part of the crisis intervention necessary to enable B.H. and S.H. to cooperate with each other in order to clean up their profoundly untidy house. Such activity by the Petitioner falls within the definition of counseling. The Petitioner strove to satisfy her ethical obligation to provide B.H. with the contact and services necessary to meet B.H.'s significant needs. It is noteworthy that B.H. had threatened suicide on numerous occasions while under the care of several professionals, including the Petitioner. The Petitioner would have been derelict in her professional duties if she had abandoned B.H. under such circumstances. The Petitioner had nothing in common socially with B.H. or her husband, and the Petitioner possessed no motivation to spend time with B.H. other than to counsel her professionally. The Petitioner billed BCBSMT only for counseling and behavior-modification services provided to B.H. and S.H. Given B.H.'s diagnosed Borderline Personality Disorder and her manipulative conduct manifesting this condition, the Petitioner was eventually placed in the position of having to distance herself from the patient. B.H. repeatedly telephoned the Petitioner after the Petitioner had moved to Tennessee in an effort to terminate the professional relationship between the parties.

At the contested-case hearing, the Respondent narrowed the charges into billing fraud, retaliation/interference with disciplinary process, dual relationships (boundary violations), breach of confidentiality, and misleading advertising. On

December 8, 2006, in his Proposed Findings of Fact, Conclusions of Law, and Recommended Order, the Hearing Officer recommended revocation of the Petitioner's professional license.

The Petitioner filed exceptions and objections, and requested oral argument before the Respondent's Adjudication Panel. At the hearing, some members of the Respondent's Panel expressed their opinions that the Petitioner had properly submitted requests for payment for telephone counseling sessions under a code which BCBSMT would not honor. However, the Respondent voted to adopt, verbatim, the Proposed Findings of Fact, Conclusions of Law, and Recommended Order.

ARGUMENT

I. THE PROCEEDINGS THROUGH WHICH THE PETITIONER'S PROFESSIONAL LICENSE WAS REVOKED VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

This Court has held that the property interest in a license to practice an occupation or profession is sufficient to trigger the right to procedural due process as guaranteed by the Fourteenth Amendment. *See, e.g., Barry v. Barchi*, 443 U.S. 55 (1979). The United States courts of appeals have held similarly. *See, e.g., Mischler v. Nev. State Bd. of Med. Examiners*, 896 F.2d 408 (9th Cir. 1990) (professional license is property

protected by the Due Process Clause); *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144 (10th Cir. 2001) (the revocation of a license that is essential in the pursuit of a livelihood requires procedural due process under the Fourteenth Amendment); *Guillemard-Ginorio v. Contreras-Gomez* 490 F.3d 31 (1st Cir. 2007) (under the Due Process Clause, a state may not suspend a professional license without a sufficient predeprivation hearing).

The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The essence of procedural due process is the requirement that a person in jeopardy of a serious loss be given notice of the case against him or her and the opportunity to meet it. *Id.* at 348-49. What is necessary is that the procedure be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, in order to ensure that they are given a meaningful opportunity to present their case. *Id.* at 349. Due process is not a technical conception with fixed content unrelated to place, time, and circumstances. *Id.* at 334. Rather, due process is flexible, and calls for such procedural protections as the particular situation demands. *Id.*

The purpose of the notice required by the Due Process Clause is to apprise the affected person of, and to permit adequate preparation for, an impending hearing. *E.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). The courts of appeals have observed that procedural due process entitles a person against whom an administrative agency is about to

take adverse action to notice of the facts upon which the agency is proceeding, and an opportunity to rebut such evidence. See *Thomas v. City of New York*, 143 F.3d 31 (2d Cir. 1998); cf. *N. Ala. Express, Inc. v. United States*, 585 F.2d 783 (5th Cir. 1978) (in the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them).

The identification of the specific requirements of procedural due process in a given situation generally requires the consideration of three distinct factors: (1) the private interest that will be affected by official action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Mathews*, 424 U.S. at 335; accord *Wilkinson v. Austin*, 545 U.S. 209 (2005). The degree of the potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of administrative decisionmaking from the perspective of procedural due process. *Mathews*, 424 U.S. at 340.

The United States courts of appeals have recognized that, in the context of a licensing decision, a successful procedural due process claim must rest on a denial of fundamental fairness, such as a lack of fair procedures or impartial officials capable of judging the case on its merits. See *Entergy, Ark., Inc. v. Nebraska*,

241 F.3d 979 (8th Cir.), *on remand to* 161 F. Supp. 2d 1001 (D. Neb.), *cert. denied*, 534 U.S. 889 (2001).

This Court has approved the procedures in a professional license revocation matter when they closely parallel those of a civil action:

The procedure authorized by the Missouri statute, as it was applied by the board, satisfied these requirements. The notice prescribed was reasonable. The testimony of all witnesses who appeared before the board was taken and recorded, including that of the plaintiff in error. Although the statute did not authorize the board to issue subpoenas, the plaintiff in error was authorized, as the state court held, to take the depositions of witnesses who did not voluntarily appear. Officers who take depositions are authorized to compel witnesses to attend and give testimony. The depositions, when taken, may be read at the hearing before the board. The procedure prescribed and followed here gave ample opportunity to plaintiff to make a defense to the charges preferred, and there was no denial of due process.

Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42 (1926) (citations omitted) (revocation of physician's license); *see Applewhite v. Briber*, 506 F.3d 181 (2d Cir. 2007) (physician, whose medical license was revoked in disciplinary proceeding, had no due process claim

against state medical review board, when physician had right to be represented by counsel, to present evidence, and to cross-examine witnesses)*cert. denied*, 128 S. Ct. 1741 (2008).

An administrative board clearly has the authority to determine the qualifications required for the practice of a profession. *See Douglas v. Noble*, 261 U.S. 165 (1923). In the context of substantive due process, a statute may not, consistently with the dictates of the Fourteenth Amendment, confer arbitrary discretion on a board to withhold a professional license, or to impose conditions having no relation to the qualifications necessary to practice that profession. *Id.* at 168. In the context of the administrative revocation of a professional certificate, it has been held that an agency's failure explicitly to consider the licensee's positive experience, as a counterbalance to his or her negative experience, is arbitrary and unfair. *See Iyer v. Drug Enforcement Admin.*, 249 F. App'x 159 (11th Cir. 2007) (physician's license to dispense controlled substances).

In the case at bar, the Respondent violated the Petitioner's right to procedural due process in several respects. First, the Petitioner was denied her due process rights of notice and an opportunity to be heard, when the Respondent permitted BCBSMT to submit to the Screening Panel voluminous materials regarding the Petitioner without providing the Petitioner an opportunity to review the materials in order to develop her defenses, in violation of state law. *See Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981) (party to screening-panel proceedings possesses a

constitutional right to use evidence presented to the screening panel in subsequent proceedings). The Screening Panel's findings constituted evidence in the hearings before the Hearing Examiner and the Respondent, as well as on the action for judicial review. The Petitioner was deprived of notice and an opportunity to review the materials submitted to the Screening Panel by BCBSMT. The Screening Panel's findings, when made, became evidence, but they were evidence from the development of which the Petitioner was wrongfully excluded. The fact that the Petitioner may have had time to view the materials before the entry of the final order does not remedy the fact that she was denied the opportunity to discern the manner in which the evidence was characterized when presented to the Screening Panel, knowledge which would have proved eminently important in the preparation of the Petitioner's defense. Clearly, the Petitioner, as a professional licensee facing revocation of her license, was not afforded anything close to the procedure given to civil litigants in court. *See Hurwitz*, 271 U.S. at 42.

Second, virtually the entire case of the Respondent against the Petitioner was based upon the allegation that the Petitioner's use of the Homebuilder Model of professional counseling was improper. Nevertheless, the record is devoid of any evidence that the Petitioner was provided notice that the charges against her were based upon her allegedly unlawful use of the Homebuilder Model, with its associated out-of-office counseling and billing for such treatment. Indeed, the Petitioner walked into the administrative disciplinary proceedings without any inkling that her

very model of professional counseling would be challenged. On the appeal before the Montana Supreme Court, the Respondent argued that it owed the Petitioner no more notice than it provided because the Petitioner did not "ask the Department to identify the relationship upon which she was charged with professional misconduct." (A-153.) Thus conceding a failure to provide procedural due process, the Respondent did nothing on judicial review to prove that this lapse was somehow offset by a mechanism allowing the Petitioner to be heard on this crucial issue at a meaningful time and in a meaningful manner. The Respondent's decision to revoke the Petitioner's professional license upon such a procedure constituted a violation of the Petitioner's right to procedural due process. The Montana Supreme Court's affirmance of that decision continued the violation.

Third, the administrative decision violated the Petitioner's constitutional right to procedural due process because the Respondent raised issues which were not addressed in the proceedings before the Hearing Examiner. For instance, the Respondent cited the Licensed Professional Counselors Code of Ethics in asserting that the Petitioner violated her ethical obligations by using the Homebuilder Model, even though the Respondent had approved the use of similar models previously. (A-350.) Moreover, nowhere in the proceedings before the Screening Panel, the Hearing Examiner, or the Respondent's

Adjudication Panel was the dual relationship² allegedly created by the use of the Homebuilder Model identified. Dual relationships are not prohibited per se. In fact, the Respondent has approved their use when they are proved to be therapeutic and are conducted under supervision. The Petitioner was being supervised in her treatment of B.H. and S.H. by Dr. Roger Dale Barnes. (A-313.)

Fourth, BCBSMT's intimate involvement in the Respondent's administrative disciplinary proceedings, essentially using such proceedings as a collection mechanism against licensees, gave rise to a violation of the Petitioner's constitutional right to procedural due process. Fundamental fairness is a tenet of due process. *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18 (1981). The Fourteenth Amendment imposes on States the standards necessary to ensure that judicial proceedings are fundamentally fair. *Id.* at 33. The basic requirement of due process that a person receive a fair trial in a fair tribunal applies equally to civil and to administrative proceedings. See *Withrow v. Larkin*, 421 U.S. 35

²An examination of the record reveals that the Respondent nowhere identified what type of dual relationship, if any, was created by the Petitioner's use of the Homebuilder Model. This fact is crucial, given that the very foundation of the Respondent's dual-relationship allegation was based upon the use of that specific therapeutic model. For this reason, the Petitioner was actually deprived of notice as to the charge which she was being called upon to defend.

(1975). A regulated professional has a constitutional right to a fair and impartial hearing in disciplinary proceedings. See *Friedman v. Rogers*, 440 U.S. 1, rehearing denied, 441 U.S. 917 (1979). Due process requires a neutral and detached judge. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993). Before a person may be deprived of a protected interest, whether in a criminal or a civil setting, he or she is entitled as a matter of due process to an adjudicator who is not in a situation which would offer possible temptation to the average person as a judge, and might lead him or her not to hold the balance nice, clear, and true. *Id.* at 618. This Court has held that persons with a substantial pecuniary interest in professional disciplinary proceedings should not adjudicate such disputes. *Gibson v. Berryhill*, 411 U.S. 564 (1973). The courts of appeals have recognized that a state licensing tribunal violates due process when its members have a direct and substantial competitive interest in the outcome of the proceeding before them. See, e.g., *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995). Moreover, the combination of investigative and adjudicative functions in an administrative body can create an unconstitutional risk of bias in an adjudication when, under a realistic appraisal of psychological tendencies and human weakness, a risk of actual bias or prejudgment is posed by conferring investigative and adjudicative powers on the same persons. *Withrow*, 421 U.S. at 47.

BCBSMT is one of the major insurers of the professional services regulated by the Respondent. BCBSMT's coverage and payment decisions have a

substantial effect on the professional counseling field in Montana, and on the Respondent's members who are members of that profession. BCBSMT frequently causes to be initiated, as it did in this case, proceedings against a licensee who is purported to have overbilled or otherwise improperly billed the insurer for the licensee's services. Given BCBSMT's influence over the professional counseling field and its regulators, that insurer's heavy involvement in the present case, including its withholding of documents from the Petitioner, calls into question the fundamental fairness of the adjudicative proceedings through which the Petitioner lost her professional license. For this reason as well, the Petitioner's right to procedural due process was abridged by the Respondent's revocation decision and by the Montana Supreme Court's affirmation of that decision. For all these reasons, this Court should grant certiorari in order to reverse the judgment of the Montana Supreme Court, and to remand this case with instructions that the Petitioner's license be reinstated.

II. THE STATUTES AND REGULATIONS UNDER WHICH THE PETITIONER WAS CHARGED WITH PROFESSIONAL MISCONDUCT AND UNDER WHICH HER LICENSE AS A CLINICAL PROFESSIONAL COUNSELOR WAS REVOKED WERE UNCONSTITUTIONALLY VAGUE.

The void-for-vagueness doctrine applies to civil as well as to criminal actions, where exaction of

obedience to a rule or standard is so vague and indefinite as really to be no rule at all. *Boutilier v. INS*, 387 U.S. 118 (1967). Such an exaction upon indefinite standards is unconstitutional if it strips a participant of his or her rights. *Id.* at 124.

A statute is impermissibly vague if it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or if it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703 (2000). A statute is void for vagueness if it forbids or requires the doing of an action in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Zwickler v. Koota*, 389 U.S. 241 (1967), *on remand* to 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd*, 394 U.S. 103 (1969). What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved, but the indeterminacy of precisely what that fact is. *United States v. Williams*, 128 S. Ct. 1830 (2008).

In the present case, the Petitioner was charged with violating professional standards set forth in Mont. Code Ann. § 37-1-316, which provides, in relevant part:

§ 37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

....

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

(5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

....

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

....

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal

action from being filed, prosecuted, or completed;

....

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

The Petitioner was also charged with violating provisions of the Montana Administrative Code. Rule 24.219.804 provides in relevant part:

**24.219.804. CODE OF ETHICS—
LICENSED PROFESSIONAL
COUNSELORS**

(1) Pursuant to 37-22-201 and 37-23-103, MCA, the board hereby adopts the following professional and ethical standards for licensed professional counselors and licensed social workers to ensure the ethical, qualified, and professional practice of social work and professional counseling for the protection of the general public. These standards supplement current applicable statutes

and rules of the board. A violation of the following is considered unprofessional conduct as set forth elsewhere in rule and may subject the licensee to such penalties and sanctions provided in 37-1-136, MCA.

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

....

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

....

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

....

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information[.]

Rule 24.219.2305, also cited by the Respondent as a basis for the proceedings against the Petitioner, states in pertinent part:

**24.219.2305. UNPROFESSIONAL,
CONDUCT FOR PROFESSIONAL
COUNSELORS**

(1) Violation of any of the following constitutes unprofessional conduct:

....

(b) Intentionally cause physical or emotional harm to a client.

In the present case, virtually the entire support for the Respondent's finding, affirmed by the Montana Supreme Court, that the Petitioner committed billing fraud was the Respondent's determination that the Petitioner had improperly used the Homebuilder Model, and, therefore, had unlawfully billed for out-of-office counseling. (A-20-38, A-45-62.) However, the Petitioner was never provided with notice as to the identity of the forbidden dual relationship allegedly created by her use of the Homebuilder Model, in which she had been professionally trained (A-319), or as to what statutory and regulatory standards prohibited her use of that model. The provisions cited in the charging documents provided the Petitioner with no notice of the standard to which her conduct was required to conform.

The linchpin of the Respondent's case against the Petitioner was the statutory prohibition against unprofessional conduct on the part of a licensed professional counselor. *See* Mont. Code Ann. § 37-1-316. The only portion of that statute arguably touching upon the Petitioner's use of the Homebuilder Model of professional counseling is subsection (8), which prohibits "conduct that does not meet the generally accepted standards of practice." The problem is that the Homebuilder Model *does* meet the generally accepted standards of practice of the professional counseling community nationally, and has been authorized for use in Montana under adequate supervision. Neither the Petitioner nor any other professional counselor of ordinary intelligence could reasonably suspect that this statutory prohibition was intended to sweep the Homebuilder Model within its

ambit. Moreover, the regulations under which the Petitioner was charged, which could have been used to fill in gaps left by the statute, are no less vague than the statute itself with respect to the conduct with which the Petitioner was charged. Rule 24.219.2305 is no more specific than Mont. Code Ann. § 37-1-316(18) in providing notice to a professional counselor that the use of the Homebuilder Model or a dual relationship is prohibited. Although Rule 24.219.804 is more verbose, this provision also lacks any language which could serve as notice to a reasonable person that the use of the Homebuilder Model or a dual relationship in professional counseling is prohibited conduct on the part of a licensee.

The Respondent charged that the Petitioner's use of the Homebuilder Model of counseling caused harm to B.H., within the meaning of the foregoing provisions. However, neither Mont. Code Ann. § 37-1-316 nor Mont. Admin. R. 24.219.804 defines the term "harm" for purposes of the revocation of the license of a professional counselor. Mont. Admin. R. 24.219.2305(1)(b), which sets forth the elements of unprofessional conduct for professional counselors, provides that intentionally causing "physical or emotional harm to a client" is unprofessional conduct. The Respondent relied upon Mont. Admin. R. 24.219.2305(1)(b) to define conduct that does not meet the generally accepted standards of practice for purposes of Mont. Code Ann. § 37-1-316(18). However, this rule and the statute allegedly incorporating it contain a constitutionally insufficient standard by which the acts of professional counselors are to be judged. Cross-referencing these provisions does not

eliminate their unconstitutional vagueness. No professional counselor of ordinary intelligence could reasonably understand that these provisions forbid the use of an entire therapeutic model of counseling—the Homebuilder Model—which has been approved by the profession as a whole and, indeed, by the Respondent for use in Montana under restrictions which were present in this case. A reasonable professional counselor would have to guess in order to conclude that such conduct is prohibited by the statutes and regulations under which the Respondent charged the Petitioner, and such professionals would inevitably differ as to the application of these laws. Such vagueness renders these provisions unconstitutional. *Zwickler*, 389 U.S. at 249. The provisions upon which the Respondent relied in revoking the Petitioner's license for causing harm to B.H. and S.H. are unconstitutionally vague because they purport to allow the revocation of the Petitioner's license upon evidence which clearly indicates that the Petitioner did no harm to her clients. Hence, the Petitioner was placed in the position of having to guess at the meaning of these provisions.

For these reasons, the Respondent revoked the Petitioner's professional license upon statutes and regulations that were unconstitutionally vague. The Montana Supreme Court's affirmance of the Respondent's decision cannot stand consistently with constitutional principles requiring that a statute or regulation demanding conduct be reasonably clear as to the acts it prohibits. The unconstitutional vagueness of the statutes and regulations upon which the Petitioner's professional license was revoked

permitted, and even encouraged, arbitrary enforcement. Accordingly, this Court should grant certiorari in order to reverse the judgment of the Montana Supreme Court, and to remand this case with instructions that the Petitioner's license be reinstated.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that this Honorable Court exercise its certiorari jurisdiction to correct the conflict between the decision of the Montana Supreme Court and the relevant decisions of this Court with respect to the minimal constitutional requirements for procedural due process, and to when a statute is unconstitutional due to vagueness. It is respectfully submitted that this result should be accomplished by granting certiorari to reverse the decision of the Montana Supreme Court, and to remand the case to that court with instructions that the Petitioner's license be reinstated.

Respectfully submitted,

MARY J. CLEMENT
Pro Se
696-B Northrup Road
Portland, TN 37148
(615) 206-1343

NO. _____

In the
Supreme Court of the United States

MARY J. CLEMENT,
Petitioner,

v.

MONTANA DEPARTMENT OF
LABOR AND INDUSTRY,
Respondent.

*On Petition for Writ of Certiorari to the
Supreme Court of Montana*

APPENDIX

MARY J. CLEMENT
696-B Northrup Road
Portland, TN 37148
(615) 206-1343
Petitioner, Pro Se

Supreme Court of Montana.

Mary J. CLEMENT, Petitioner and Appellant,

v.

MONTANA DEPARTMENT OF LABOR
AND INDUSTRY, Respondent and Appellee.

No. DA 08-0077.

Submitted on Briefs Oct. 16, 2008.

Decided Nov. 18, 2008.

Background: Counselor sought review of judgment of the District Court of the First Judicial District, Lewis and Clark County, Cause No. BDV 07-329, Jeffrey M. Sherlock, P.J., affirming the decision of the Board of Social Work Examiners and Professional Counselors to revoke counselor's license to practice as a licensed clinical professional counselor.

Holding: The Supreme Court, Brian Morris, J., held that substantial evidence supported decision to revoke counselor's professional license.

Affirmed.

APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. BDV 07-329, Honorable Jeffrey M. Sherlock, Presiding Judge.

For Appellant: Mary J. Clement (self-represented),
Portland, Tennessee.

For Appellee: Don E. Harris, Department of Labor &
Industry, Helena, Montana.

Justice BRIAN MORRIS delivered the Opinion of the
Court.

Pursuant to Section I, Paragraph 3(d), Montana
Supreme Court 1996 Internal Operating Rules, as
amended in 2003, the following memorandum decision
shall not be cited as precedent. It shall be filed as a
public document with the Clerk of the Supreme Court
and its case title, Supreme Court cause number and
disposition shall be included in this Court's quarterly
list of noncitable cases published in the Pacific
Reporter and Montana Reports.

Appellant Mary J. Clement (Clement) appeals
the District Court's order on judicial review that
affirmed the decision of the Montana Board of Social
Work Examiners and Professional Counselors (Board)
to revoke Clement's license to practice as a licensed
clinical professional counselor. We affirm.

Clement received her Montana license as a
clinical professional counselor in September 2000. She
initially worked under the auspices of a doctor in
Livingston and split her time between Montana and
her home state of Tennessee. Clement entered into a
particular provider agreement with Blue Cross/Blue
Shield of Montana (BCBSMT) in November 2000.
Clement agreed to accept full payment from BCBSMT

with no charge to her clients who had health insurance coverage with BCBSMT. Clement also agreed that she would bill only for face-to-face counseling sessions with her clients.

A billing dispute arose between Clement and BCBSMT regarding Clement's bills for her treatment of husband and wife, S.H. and B.H., who are BCBSMT subscribers. The couple's insurance policy contained an unlimited mental health benefit with no dollar limit for counseling, no co-payment, and no deductible. Clement's agreement with BCBSMT prevented her from billing B.H. and S.H. for any amounts not paid by BCBSMT.

BCBSMT eventually audited Clement's billing practices and sought reimbursement for over \$13,000 in fees that had been paid to Clement. Clement returned over \$13,000 to BCBSMT. She soon filed a complaint in Park County Justice Court where she sought to recoup \$2,940 from B.H. and S.H. for amounts not paid by BCBSMT. The Park County Justice of the Peace ruled in favor of B.H. and S.H. on the merits.

B.H. and S.H. filed a complaint with the Board regarding Clement's improper billing. On the same day that Clement received a copy of the complaint, she sent an unsolicited letter to the Social Security Administration in which she claimed that B.H. was a "malingerer." Clement also prepared a document entitled "Declaration," that she attempted to have B.H. and S.H. sign. The document sought to legitimize some of Clement's billing practices.

The Department's hearing examiner conducted a four-day contested case hearing on the complaint against Clement. The hearing examiner cited 13 separate violations of professional standards for licensed clinical professional counselors committed by Clement. The hearing examiner determined that Clement had committed unprofessional conduct in violation of § 37-1-316(4)-(5), (9), (15), (18), MCA, and Admin. R.M. 24.219.804(1)-(2) (2003). The hearing examiner determined that it was necessary to revoke Clement's license to protect the public under § 37-1-312, MCA. The Board concurred with the hearing examiner's determination to revoke Clement's license. The Board cited several aggravating factors that necessitated revocation of Clement's license, as opposed to suspension and attempted rehabilitation of Clement.

Clement filed a petition for judicial review in which she alleged that the Board violated her right to procedural due process by withholding documentation that allegedly had been provided to the Board by BCBSMT. Clement next argued that the Board should have used the clear and convincing evidence standard of review instead of the preponderance of the evidence standard of review as her case involved the revocation of a professional license. Clement further argued that her billing practices were in compliance with her BCBSMT contract in light of the fact that the BCBSMT contract was silent as to billing for overtime. Finally, Clement argued that the definition of "harm" to a patient is unconstitutionally vague as set forth under § 37-1-316, MCA, and Admin. R.M. 24.219.804

(2003). The District Court affirmed and Clement appeals.

A district court reviews an administrative agency's decision in a contested case to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law. *Solid Waste Cont. v. Dep. of Pub. Ser. Reg.*, 2007 MT 154, ¶ 16, 338 Mont. 1, ¶ 16, 161 P.3d 837, ¶ 16. Section 2-4-704(2), MCA, provides the standard of review for an agency decision. The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the applicant have been prejudiced in light of various factors. Section 2-4-704(2), MCA. A finding is clearly erroneous if it is not supported by substantial evidence, or, if it is supported by substantial evidence, because the agency misapprehended the effect of the evidence. The court may still decide that a finding is clearly erroneous when "a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *Weitz v. Dept. of Nat. Resources & Conserv.*, 284 Mont. 130, 133-34, 943 P.2d 990, 992 (1997).

We employ the same standard when reviewing the district court's decision, and must accordingly determine whether an agency's findings of fact are clearly erroneous and whether its conclusions of law were correct. *Solid Waste Cont.*, ¶ 17. We have determined to decide this case pursuant to Section I,

Paragraph 3(d) of our 1996 Internal Operating Rules, as amended in 2003, that provide for memorandum opinions. It is manifest on the face of the briefs and record before us that substantial evidence supports the District Court's findings of fact and that the District Court's legal conclusions were correct.

We affirm.

We Concur: JAMES C. NELSON, W. WILLIAM LEAPHART, JIM RICE and JOHN WARNER.

Lorraine A. Schneider
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Office of Legal Services
P.O. Box 200513
Helona, MT 59620-0513
Telephone: (406) 841-M15

Counsel for the Department

**BEFORE THE BOARD OF SOCIAL WORK
EXAMINERS AND PROFESSIONAL
COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA**

IN THE MATTER OF	) Docket No. CC-05-0048-
THE PROPOSED	) SWP
DISCIPLINARY	) NOTICE OF PROPOSED
ACTION AGAINST	) BOARD ACTION AND
THE LICENSE OF	) OPPORTUNITY FOR
MARY J. CLEMENT,	) HEARING
LCPC LICENSE NO.)
#963)

TO: Mary J. Clement, LCPC
696B Northrup Road
Portland TN 37148

Mary J. Clement, LCPC
1106 W. Park
P.O. Box 173

**Livingston, MT 69047
Mary J. Clement, LCPC
219 W. Callender St.
Apt. A-2-4
Livingston, MT 59047**

PLEASE TAKE NOTICE THAT:

The Screening Panel of the Board of Social Work Examiners and Professional Counselors of the State of Montana (Panel) has found reasonable use to believe that you may have committed acts and/or omissions that authorize the Board to take disciplinary action against your license under the provisions of Mont. Code Ann. 37-1-316 (Unprofessional Conduct) for violations of Montana statutes and rules as outlined below.

CERTIFIED CORRECT WY OF
ORIGINAL OF PUBLIC RECORD,
STATE OF MONTANA.

s/ LaVelle M. Potter
BY CUSTODIAN OF RECORDS
9-13-05

REASONS FOR ACTION

The Screening Panel has considered information presented by the Department of Labor and industry in making its reasonable cause finding(s). The following Fact Assertions and Conclusions sections summarize the allegations upon which the panel has authorized the issuance of a Notice of Proposed Board Action and Opportunity for Hearing.

FACT ASSERTIONS

1. At all times relevant to this proceeding, Licensee was and is a Licensed Clinical Professional Counselor, holding license #963, issued by the Montana Board of Social Work Examiners and Professional Counselors on September 25, 2000.

2. On or about November 4, 2003, the Montana Board of Social Work is Examiners and Professional Counselors received a formal complaint from Stephen Hopkins alleging that at times certain between February 2001 and December 2002, is Licensee was over billing or otherwise filing fraudulent claims with his insurance company, Blue Cross - Blue Shield of Montana. He asserted, inter alia, that Licensee billed for counseling sessions that never occurred; that she billed for face-to-face as counseling sessions with the Hopkinses during the 2 months of July and August 2002; se that she billed for face-to-face contacts with Mr. Hopkins and/or his wife in Montana while Licensee was in Tennessee; and that she billed BCBS approximately \$2,800 when Mrs. Hopkins picked up the Licensee at the airport and brought her home to spend the night at the Hopkinses' residence and no counseling occurred.

3. The complainant's BCBS insurance policy included an unlimited group mental health benefit, i.e., no deductible, no co-payment, no dollar limit.

4. On or about December 4, 2003, a response to the complaint was received in the Board office. Licensee denied any unprofessional conduct. She

stated that after providing 18 months of counseling services to the Hopkinses, her supervisor, Dr. Roger Dale Barnes of Tennessee, recommended she work with the Hopkins in the home and give more services to "move them through".

5. In addition to filing the complaint with the Board, the complainant also notified BCBS of his concerns. Investigations were conducted by the department and by BOBS. The investigations revealed that Licensee's billing practices included:

a. Billing under the provider number of her supervisor in Tennessee for services rendered by Licensee in Montana to clients other than the Hopkinses before Licensee was licensed in this state.

b. Billing for time when Licensee was staying in the home of the complainant and his wife, Bonnie Hopkins helping them clean house and wash dishes and when Licensee and Bonnie Hopkins went shopping. For example, clinical notes reflect Licensee worked on expanding Bonnie Hopkins's horizons and life survival skills . . . [i]ntroducing her to other places to get mattresses for her bed when she is able to get a job and pay for it;

c. "Carry over" billing wherein Licensee accumulated time in excess of the allowable duration for therapy sessions set by the insurer and billing that excess time on days that the services were not provided.

d. Billing for services that were not provided including billing for face to face contacts with Stephen Hopkins in Livingston, MT when Stephen Hopkins was out of town or was not present at the place where services were allegedly provided.

e. Billing BOBS for face-to-face contacts with Bonnie Hopkins and/or Stephen Hopkins when contact was by phone while Licensee was in Tennessee. Phone contacts are not covered by the insurance policy.

6. Licensee expended her personal funds for various purchases on behalf of the Hopkinses which Licensee characterized as "gifts" to them. The purchases, totaling more than \$4,000, included house paint for the Hopkinses' home; the house painter's charges; payments to other specialists for services allegedly rendered by them to Bonnie Hopkins; computer equipment and/or supplies including a port and camera; vitamins and oils; and airfare, hotel room, day trips, food and taxi expenses relating to a trip that Mrs. Hopkins took to Bimini with the Licensee.

7. Licensee billed BCBS for extended counseling of Ms. Hopkins during the Bimini trip. Licensee's web site describes the healing benefits of swimming in the waters of Bimini.

8. Licensee filed an action in the Park County Justice Court on June 20, 2003, in an attempt to recover \$2,340.00 that she alleged was owed to her by Bonnie and is Stephen Hopkins for professional services not paid by insurance. Judgment was se

entered in favor of the Hopkinses on or about January 21, 2004 wherein the court stated, "the doctor charged if she stopped to visit, as much as \$1,260.00 for a ten hour visit; [t]he bookkeeping of the doctor is probably the worst set of records this court has le ever viewed." The matter is currently on appeal to District Court.

9. Following its investigation of the Licensee's billing practices, BCBS demanded that Licensee return over \$13,000.00 of the payments made by it to her. It determined that 100% of her claims must be reviewed before any future payment is made.

10. BCBS provided a copy of the web site maintained by the Licensee which promotes the Licensee's use of the QXCI machine. An analysis of this machine, written by Stephen Barrett, MD, describes it as a functionally useless diagnostic tool. BCBS informed the Licensee that they will not accept claims for use of this machine.

11. BCBS's investigation revealed that Licensee displays a history of billing for high level services, with CPT procedure code 90808 billed 84% of the time during the three year span from January 1, 2001 through December 31, 2003. Many of these claims were submitted with a -22 modifier to denote additional time was spent in the session.

12. In the portion of Licensee's website (www.bold-eagle.com) that discusses her education (including Ph.D. and juris doctor degrees) and training, Licensee to describes a number of therapies that are outside the scope of her licensure, including,

but not limited to: "oils" that reduce spinal inflammation and viruses that hibernate along is the spinal column: clients are checked for allergies through "structural integration;" reorganization of the neurological "wiring" of the body through "neural organization techniques;" a "QXCI Machine" that allegedly treats energetic disturbances and "can help correct the underlying causes of allergies, food sensitivities, weight gain, digestive and bowel problems, stress, fatigue, insomnia, depression, arthritis, skin problems, headaches and migraines."

13. Licensee's clinical records indicate that Licensee disclosed to Bonnie Hopkins' employer that Licensee was Bonnie's therapist and that Bonnie and Stephen Hopkins were also under the care of Kenneth Olson, MD, a psychiatrist practicing in Bozeman, Montana. The Hopkinses did not consent to such disclosure.

14. A letter purportedly authored by Bob Telljohn, the individual that Licensee hired to paint the Hopkinses' residence, and provided by the Licensee in conjunction with the investigations, describes the insightful techniques he observed Licensee to use with the Hopkinses in their home. The Hopkinses did not consent to receiving therapy in the painter's presence.

15. Licensee described her creativity in providing therapy to Bonnie Hopkins as including the purchase of feed for a mule for the bonding that the mule facilitated.

16. Kenneth Olson, MD, a psychiatrist, stated during the course of an investigative interview that Licensee's treatment of Bonnie Hopkins was unconventional and appeared to be self-promoting. He said he saw no reason for "in-home" counseling (of Bonnie Hopkins) and that there were a lot of boundary issues with this arrangement.

17. BOBS noted that the Licensee sometimes called to justify her claims by so describing the Hopkinses' extensive and complex mental health issues.

18. Licensee has described Bonnie Hopkins's mental health problems to include matters that Licensee's clinical records do not reflect were ever addressed in therapy with Licensee.

19. On November 19, 2004, fifteen (15) days after Stephen Hopkins's complaint against the Licensee was filed with the Montana Board of Social Work Examiners & Professional Counselors, Licensee wrote to the Disability Determination Services, with whom she had previously advocated successfully for a finding that Bonnie Hopkins was disabled by reason of her extensive mental illnesses, to notify it that Bonnie Hopkins is a "malingering and that is not a mental basis for unemployability," and that "in September of 2002 she was employed past the nine month trial period to find employment" and that "she received well over her disability award."

20. After the complaint was filed herein, and during the pendency of the civil collection action in

Justice of the Peace court, Licensee presented for Bonnie Hopkins's signature, a Declaration stating, inter alia, that "BOBS told us to completely cooperate or we would be charged with fraud"; that "Foy the money returned to BCBSMT, [certain dates] were dates in which talking about issues occurred between Bonnie and Mary"; that "[Bonnie and Stephen Hopkins] also agreed then and now that in order for one of us to heal, the other needed Mary's services as well. We both had our own issues. Services were individual for Bonnie and Steve. On the same day as individual talking was going on, we also received couples or family counseling the that were never billed to BCBSMT"; and that "I agree that getting assistance from other professionals and restoring the house to a healthy condition was important for our mental and physical health [and it] could not have been accomplished without Mary Clement paying for the services at over \$4,500 which came from her savings because she had no taxable income for 2001 or 2002." Bonnie Hopkins refused to sign the Declaration.

21. Documentation supplied by the Licensee during the course of the investigations included a letter from Stanley Cornell, CPA stating that for 2001 and 2003 Mary Clement received forms 1099-MISC with a total dollar amount of \$60269.08 for all patients. The letter further stated that in 2001 and 2002 she maintained offices in Montana and Tennessee and that during these years counseling services in Montana were primarily for the benefit of Stephen and Bonnie Hopkins; that the Licensee billed BCBS a total of \$68,740.00 for services provided to

Bonnie and Stephen Hopkins and that BCBS had paid \$43,181.16.

22. Two sets of Licensee's clinical records for the Hopkinses which were supplied by Licensee to BCBS plus a third set that was admitted into evidence at the Justice Court trial referred to above, were compared and found to contain discrepancies. Additionally, some clinical notes for Bonnie Hopkins are duplicated in the notes for Stephen Hopkins.

BEFORE THE BOARD OF SOCIAL WORK
EXAMINERS AND PROFESSIONAL
COUNSELORS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-05-0048-SWP
REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 706-2006
ACTION AGAINST THE)
LICENSE OF MARY J.)
CLEMENT,)
LCPC License No. 963.)

PROPOSED FINDINGS OF FACT; CONCLUSIONS
OF LAW; AND RECOMMENDED ORDER

I. INTRODUCTION

The Business Standards Division (BSD) of the Department of Labor and Industry seeks to have sanctions imposed against the license of Mary J. Clement, a Montana licensed clinical professional counselor. BSD alleges that Clement violated Mont. Code Ann. § 37-1-316(4), Mont. Code Ann. § 37-1-316(9), Mont. Code Ann. § 37-1-316(15), Mont. Code Ann. § 37-1-316(18), and Mont. Code Ann. § 37-22-301. BSD further alleges that Clement violated Admin. R. Mont. 24.219.804(2)(a)(i), Admin. R. Mont. 24.219.804(2)(a)(iii), Admin. R. Mont. 24.219.804(2)(a)(ix), Admin. R. Mont. 24.219.804(2)(b)(i), and Admin. R. Mont. 24.219.804(2)(b)(viii).

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on May 25 and May 26 and August 17 and August 18, 2006. Lorraine Schneider, agency legal counsel, represented the BSD. Clement represented herself. Clement, Lavelle Potter, BSD Investigator, BH, Merle Boma, Bob Telljohn, Dr. Kenneth Olsen, Patrick O'Malley, PhD., Stanley Cornell, Certified Public Accountant, Karl Krieger, Blue CrossBlue Shield insurance fraud investigator, Beverly Medved, Emily Olsen, Christine Hillegass, PhD., Barbara Eckstein, Brenda Wares, Terry Manska, Arlene Troy, and Roger Dale Barnes, PhD., all testified under oath.¹ Department's Exhibits 1(2), 1(2)(A), 1(2)(B)(1), 1(2)(B)(2), 1(2)(C)(2), 1(2)(L), 1(2)(M), 1(2)(N), 1(2)(P), 1(2)(Q), 1(3), 1(4), (1)(5), 3, 3(a), and Licensee's Exhibits A, B, C, D, E, F, I, J and Attachment 6 were admitted into the record. The parties were permitted to file post-hearing briefs with the last brief in this matter being received by the Hearings Bureau on October 16, 2006. Having considered the evidence and arguments presented, the hearing examiner finds that Clement committed egregious violations of professional standards and recommends that her license be revoked. This

¹The hearing examiner has chosen to refer to client BH, who testified, and client SH by initials only and not by full name. While these persons did not assert any privacy right in this matter, the hearing examiner has nonetheless referred only to the clients' initials to lessen the likelihood of any untoward impact upon the witness' privacy rights as a result of testifying in this case.

recommended decision is based on the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Clement has held a Montana licensed clinical professional counselor license since September 25, 2000.

2. During the mid 1980's, Clement worked as an intern for Child Protective Services in Richmond, Virginia. She was not a licensed clinical professional counselor at that time. In that position, she utilized something known as the "Home Builder" model. That model was used in the context of social work, not licensed clinical professional counseling. However, as will be discussed below, Clement continued and continues to use the "Home Builder" model even though it is not a recognized modality of treatment in the licensed clinical professional counseling arena.

3. Clement began taking on clients in Montana in 2000, working under the auspices of Roger Dale Barnes, PhD. Clement set up practice in Livingston, Montana. Clement did not spend all of her time in Montana. She split her time between Montana and her home in Tennessee.

4. Clement entered into a participating provider agreement with insurer Blue Cross/Blue Shield of Montana (BCBS) in November, 2000 (Exhibit 3) to provide counseling. Under Clement's agreement with BCBS, she agreed to accept as full payment "without charge to the beneficiary" the allowance

established by BCBS (Exhibit 3, page 2). She also agreed that she would only bill for face to face counseling sessions. Under the provider agreement with BCBS, "face to face" counseling meant that Clement would counsel clients in an office or outpatient setting and that the client would be in Clement's physical presence while counseling.

5. Clement began treating BH and SH, husband and wife, in February, 2001. BCBS issued BH's and SH's medical insurance policy, and Clement's counseling of BH and SH was controlled by Clement's BCBS participating provider agreement. BH's and SH's policy included an unlimited mental health benefit, having no deductible, no co-payment and no dollar limit on services that could be provided.

6. In order to receive payment for services from BCBS, a licensed clinical professional counselor like Clement must utilize certain standardized numerical billing codes which describe both the type of service provided as well as the length of the time that the service was provided. The three codes at issue in this case are the 90804, 90806 and 90808 codes. The 90804 code provides payment to the counselor for 25 minutes of face to face counseling. The 90806 code provides payment for 45 to 50 minutes of face to face counseling. The 90808 code provides payment for 75 to 80 minutes of face to face counseling. There is also a fourth code, a "22 modifier," which permits the counselor to seek reimbursement for an additional 20 minutes of face to face counseling over the 90808 code.

7. Clement continued to treat BH and SH through 2002. At the beginning of the counseling relationship, Clement met with BH at Clement's office about six times. After that time, however, Clement began to "counsel" BH while the two were shopping in Bozeman, swimming at Chico Hot Springs, and while the two were driving together. Clement billed BCBS for these so-called "counseling sessions."

8. Some of the more egregious examples of Clement's improper billing practices while treating BH include:

(A) Clement flew into Bozeman one time and arranged to have BH pick her up at the airport. Clement was on her way through Livingston to pick up a car from a client. At Clement's request, Clement spent the night at BH's home before going on to pick up the car. Clement then had BH drive her to Pray, Montana, to permit Clement to retrieve the car from her other client. While Clement and BH were in route to BH's house, they discussed *Clement's* plans and *Clement's* future, not BH's issues. Clement never informed BH that they were involved in counseling during any of this contact. No recognized professionally substantive counseling occurred during this time. Nonetheless, Clement billed BCBS for this time with BH.

(B) On another occasion, Clement spent the night at BH's house while Clement was traveling from Tennessee and passing through Livingston. Clement

never informed BH that they were involved in counseling during any of this contact. Nevertheless, she also billed for this time.

(C) On another occasion, Clement had BH drive her to Bozeman to go to Staples Office Supplies so that BH could get an Internet video camera. The purpose of purchasing the camera was to permit Clement to have "face to face" meetings with BH and SH when Clement was back in Tennessee. Again, Clement never informed BH that they were involved in counseling during this contact, yet Clement billed BCBS for this time.

(D) On another occasion, Clement and BH went shopping to buy a Lazy Boy recliner for SH. This was done at Clement's urging. Clement never informed BH that they were involved in counseling during any of this contact. Clement billed BCBS for this time that she spent with BH.

(E) On other occasions, Clement and BH would go to Chico Hot Springs to go swimming. Clement billed BCBS for this time. Clement never informed BH that they were involved in counseling during any of these contacts.

(F) Clement also invited BH to attend a trip to Bimini. This was an all expense paid trip, paid for by Clement. It included airfare and lodging in Bimini. Clement's other clients also attended. The trip included swimming with dolphins. As was true of the other so called "counseling sessions," Clement billed BCBS for counseling with BH during this trip.

(G) BH was employed at the Stands Ranch located near Livingston. Clement came up to the ranch and stayed for a period of approximately three days. During this time, Clement apparently charged persons at the ranch for counseling services. In addition, Clement billed BCBS for counseling services rendered to BH even though she provided no counseling services to BH during this time period. And again, Clement never informed BH that they were involved in counseling during any of this contact.

9. Clement maintains a web site, Bold Eagle, where, among other things, she advertises the therapeutic benefits of swimming with dolphins. There is no substantial evidence that swimming with dolphins is recognized as therapeutic treatment in licensed clinical professional counseling. This makes Clement's web site misleading.

10. At least 80% of Clement's billing for counseling services for BH and SH were at the 90808 level. For many of these sessions, Clement also sought additional money by adding the 22 modifier. This was far more frequent than most other providers (which averaged around 30%). Clement's conduct raised a red flag for BCBS, causing that entity to review Clement's billing practices. Eventually, BCBS disallowed Clement's use of the 22 modifier. Clement, undeterred by the BCBS disallowance, and obviously aware of the limitations of the BCBS contract which would not permit her to bill more hours for counseling with BH, began to carry over charges to subsequent months and bill that time as face to face counseling with BH and SH *even though she did not in fact counsel them at all*

(she was not even in Montana on the dates that she claimed to have rendered services). According to Clement, this cant' over billing occurred approximately 14 times. Clement's conduct was fraudulent in that Clement knew that she was extracting payment from BCBS for services not rendered to BH and SH in accordance with Clement's contract with BCBS. Nonetheless, she continued to engage in this type of billing practice.

11. Clement also billed BCBS utilizing the face to face billing codes when in fact she was counseling BH and SH by telephone, a service that was not compensable under Clement's participating provider contract with BCBS. Nonetheless, Clement sought reimbursement for those sessions. This conduct, also, was fraudulent in that Clement knew or should have known that the telephone services she was providing were not reimbursable, yet she sought payment for them claiming they were face to face counseling sessions.

12. Clement took no initiative to advise BCBS that she was carrying over her billing in the manner described in Paragraph 10 above. Indeed, but for the fact that BCBS received complaints about fraudulent billing practices from BH and SH and launched an investigation which required her to respond, Clement might not have ever reported this conduct.

13. Clement also conducted what she termed as therapy utilizing the "Home Builder" model in BH's and SH's home. Clement hired two painters, one of

whom was Bob Telljohn, who cleaned and painted the home. Clement herself was present in the home, helping to do cleaning. Clement billed BCBS for counseling services for all of the time she spent in the home.

14. Clement claims she was counseling BH in the home in the presence of Telljohn. Clement never obtained BH's express consent to conduct counseling in the presence of a third party. In addition, Clement quite frequently disclosed to other people that she was treating BH, even while in BH's presence.

15. BCBS's investigation into Clement's billing practices resulted in BCBS demanding that she return over \$13,000.00 in fees that she had been improperly paid due to her fraudulent billing practices. Soon after returning the money to BCBS, Clement brought suit against BH and SH in Park County, Montana, justice court seeking to recoup the amounts she had paid back to BCBS. After a hearing on the merits, the justice of the county court ruled in favor of BH and SH.

16. On November 4, 2003, BSD forwarded a letter to Clement indicating that BH and SH had filed a complaint against her license. A return receipt from the United States Postal Service indicates that Clement received the letter on November 19, 2003.

17. On the same day that Clement received the notice of the complaint from BSD, she sent a letter to the Social Security Administration (Exhibit 1(2)(m)), exclaiming that BH was a "malingerer and that is not

a basis for unemployability." Clement also stated in that letter that BH "in September of 2002, she was employed past the nine month trial period to find employment." *Id.* Before writing this letter, Clement had not conducted any new evaluation of BH and was no longer treating BH. The sole purpose of Clement's letter was to retaliate against BH for filing a complaint with the Board of Social Workers and Professional Counselors.

18. Clement also tried to get BH and SH to sign a document entitled a "Declaration" (Exhibit 1(4)). The declaration in essence tried to get BH and SH to legitimize Clement's billing practices and further tries to have them legitimize Clement's justice court claim against them. In addition, the document attempts to paint BCBS as the true genesis of BH's and SH's complaints by suggesting that BCBS threatened to accuse BH and SH of fraud if they did not cooperate in bringing a complaint against Clement. BH and SH refused to sign the document because it was not true.

19. Dr. Patrick O'Malley, a licensed clinical professional counselor, testified at the hearing. Dr. O'Malley has had substantial experience with professional ethics in clinical counseling. He has a masters in clinical counseling and a PhD in marriage and family counseling. He has been the chair of the Ethics Committee of the American Counseling Association which promulgates ethical rules for licensed clinical counselors. He also serves as the chairman of the judicial committee of the American Association for American Family Therapy. Between 1998 and 2000, he served on the task force that

rewrote the code of ethics for the American Association for Marriage and Family Therapy. Dr. O'Malley is superbly qualified to testify regarding ethical conduct of licensed clinical professional counselors such as Clement.

20. As Dr. O'Malley testified, and the hearing examiner finds, Clement violated professional standards by permitting counseling between her and BH to take place in the presence of others. Clement's counseling of BH in the presence of Telljohn in BH's home while Telljohn was painting BH's home was unprofessional. Clement further violated professional standards by sending her letter to the Social Security Administration in November, 2003, accusing BH of being a malingerer.

21. As Dr. O'Malley testified, and the hearing examiner also finds, Clement's conduct of having BH drive her from the airport and spending the night at BH's house, allowing BH to then drive her to pick up a car, shopping with BH, and taking BH to Birmini was improper. Clement's conduct was a textbook example of engaging in an improper dual relationship which not only had the potential to adversely affect the therapeutic relationship, but in fact did adversely affect the relationship as noted below in Paragraph 25.

22. Clement gifted \$4,567.90 to BH and SH while treating them. This amount consisted primarily of Clement's payment for expenses for cleaning and painting BH's and SH's home. As Dr. O'Malley testified, and the hearing examiner finds, gifting this much money to clients was inappropriate and is yet

another example of the improper dual relationship that Clement entered into with BH and SH.

23. As Dr. O'Malley testified, and the hearing examiner finds, engaging in the type of dual relationship such as that exhibited in this case can result in harm to the client. When a dual relationship cannot be avoided, the counselor must "take appropriate professional precautions such as informed consent, consultation, supervision and documentation to ensure that judgement is not impaired and no exploitation occurs" (Record Transcript, Day 1, page 256, lines 7-11). Here, Clement made no efforts to secure BH's or SH's consent and Clement unquestionably exploited BH for Clement's own benefit (such as the incident of having BH pick Clement up at the airport and then spending the night at BH's house).

24. As Dr. O'Malley testified, and the hearing examiner so finds, the need to maintain and be cognizant of professional boundaries is particularly important when a client has symptoms of borderline personality disorder such as BH suffered in this case. With persons afflicted by that type of disorder, a failure to maintain professional boundaries can be devastating to the client.

25. Clement's improper dual relationships with BH was detrimental to BH's mental health and her treatment. As a result of Clement's conduct, BH began to distrust her other mental health providers such as Dr. Olsen.

26. There are several aggravating factors in Clement's conduct that call for imposition of revocation of her license in order to protect the public. Not the least of these are:

(A) The fact that she committed fraud upon BCBS by billing for counseling she did not in fact undertake in accordance with her BCBS contract in order to avoid coverage limitations in her contract with BCBS.

(B) Clement and her "Home Builder" model denigrate long accepted models of professional boundaries by actively promoting dual relationships of a type that are potentially (and actually) destructive to clients without regard to the client's well-being.

(C) Because of her continued desire to implement the "Home Builder" model, even though it has no demonstrated scientific application to licensed clinical professional counseling, Clement is incapable of safeguarding clients from the dangers of dual relationships.

(D) Clement engaged in retaliatory tactics designed to disrupt an investigation into her professional conduct by attempting to get BH and SH to sign the declaration that Clement had prepared in order to absolve Clement of responsibility for the debacle that she created by fraudulent billing.

(E) Clement engaged in retaliatory conduct against BH by sending an unsolicited letter to the Social Security Administration accusing BH of being a

malingerer and suggesting her ineligibility for social security benefits in retaliation for BH's filing of a complaint with the Montana Board of Social Work Examiners and Professional Counselors. Clement did this even though she had no 'professional basis (such as a recent evaluation of BH) that would have given her cause for believing BH to be a malingerer. This conduct demonstrates unbridled malice toward BH, a former client, as well as a complete disregard for rules prohibiting disclosure of information acquired from a client while counseling that client.

III. CONCLUSIONS OF LAW²

A. *Clement Committed Acts of Unprofessional Conduct.*

1. The Board of Social Work Examiners and Professional Counselors has the authority to license clinical social workers and to discipline licensees who engage in unprofessional conduct. Mont. Code. Mn. §§ 37-1-307 and 37-22-201.

2. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct.

²Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126.

3. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

* * *

(4) signing or issuing in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

* * *

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

* * *

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by use of threats or harassment against or inducement to a client or witness to

prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

4. Mont. Code Ann. § 37-22-301 prohibits a licensee from disclosing information received from clients who are consulting the licensee in a professional capacity.

5. Admin. R. Mont. 24.219.804(1) provides that a violation of any of the ethical rules promulgated by the Board under this regulation is unprofessional conduct. Admin. R. Mont. 24.219.804(2)(a)(i) prohibits a counselor from committing fraud or misrepresenting services performed. Admin. R. Mont. 24.219.804(2)(a)(iii) prohibits a counselor from violating a position of trust by knowingly committing any act detrimental to a client. Admin. R. Mont. 24.219.804(2)(a)(ix) prohibits a counselor from engaging in any advertising which is in any way fraudulent, false, deceptive, or misleading.

6. Admin. R. Mont. 24.219.804(2)(b)(I) requires a counselor to provide clients complete

information regarding the extent and nature of the services available to them. Admin. R. Mont. 24.219.804(2)(b)(viii) further requires a licensee to safeguard information provided by a client except where required by law.

7. Clement knowingly billed BCBS for counseling to BH and SH which Clement was not providing in accord with her BCBS contract by billing for counseling on dates when she provided no counseling. She also knowingly billed as face to face counseling her telephonic counseling with BH and SH, a service which was not compensable under her BCBS contract. Clement did this in order to get around contractually imposed limitations in her BCBS contract. By engaging in this conduct, Clement has committed fraud and has thereby violated Mont. Code Ann. §§ 37-1-316(4) and (5) as well as Admin. R. Mont. 24.219.804(a)(i).

8. Clement retaliated against BH and SH after they filed their complaint by sending an unsolicited letter to the Social Security Administration not only claiming that BH was a malingerer but also that BH had, in essence, defrauded Social Security in her employment at Stands Ranch. It was not sheer coincidence that this letter was generated the same day that Clement received the complaint against her license. It was retaliatory and violated Mont. Code Ann. § 37-1-316(15).

9. While treating BH and SH, Clement repeatedly entwined herself in impermissible dual relationships with BH and SH, not the least of which

was the gifting of over \$4,500.00. While Clement attempted at hearing to are that this was not truly a gift, her letter to BH and SH (Exhibit 1(2)(B)(1)) shows that it was. The substantial evidence in this case (testimony from O'Malley, Olsen, Hillegass and even Clement's own witness, Wares) demonstrates that the \$4,500.00 plus gift exceeded professional boundaries. Clement used BH for her own personal ends (such as getting BH to pick her up at the airport and then getting BH to take her to pick up an automobile). Clement further impermissibly blurred the lines of her professional relationship with BH by taking BH to Bimini and paying for expenses such as airfare and hotel. Clement's dual relationship with BH and SH violated Mont. Code Ann. § 37-1-316(18).

10. Clement violated Mont. Code Ann. § 37-1-316(15) and Mont. Code Ann. § 37-22-301 by permitting counseling between her and BH to take place in the presence of Bob Telljohn. Clement's suggestion in her closing brief that BH waived this privilege because BH failed to outwardly object to Telljohn's presence is incorrect. Clement has confused a standard of admission of evidence in a trial with the explicit standards governing professional conduct. It is the standard of professional conduct that applies to this case. The protections accorded clients by that standard, which requires the licensee to obtain a knowing waiver of confidentiality from the client, would be neutered if Clement's argument were adopted. Here, Clement made no attempt to obtain a knowing waiver from BH about engaging counseling in the presence of Telljohn and therefore violated the requirement that Clement protect BH's confidences.

11. Clement violated Admin. R. Mont. 24.219.804(2)(a)(ix) by advertising that on her web site that "swimming with the dolphins" was therapeutic. There is no validated treatment modality in licensed clinical professional counseling that substantiates such a claim. This makes Clement's web site misleading.

12. Because the BSD proved that Clement violated the statute and administrative regulations noted in the preceding paragraph, BSD also proved a derivative violation of Mont. Code Ann. § 37-1-316(18). Admin. R. Mont. 24.219.804(1).

B. *The Appropriate Sanction is Revocation.*

13. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may revoke a licensee's license.

14. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

15. There are numerous aggravating factors in this case that convince the hearing examiner that revocation is the only way to protect the public from Clement. These factors include:

(A) Clement is convinced that the "Home Builder" model is an appropriate means of treatment even though it is not. That model necessarily blurs professional and personal relationships and legitimizes the blurring of those relationships despite the profession's requirements to scrupulously observe those boundaries. The disastrous consequences of using the model are manifest in this case. The testimony of Dr. O'Malley, Dr. Olsen, and Dr. Hillegass convinces this hearing examiner that there is no presently medically or scientifically justifiable basis for asserting that the "Home Builder" model is a legitimate modality of treatment in the course of licensed clinical professional counseling. All three of those doctors (two of whom are PhDs and one of whom is an MD) had never heard of the model being applied in a licensed counseling context. Despite this, because Clement is convinced of the model's legitimacy, she will continue to utilize that model despite the risk for significant harm to clients.

(B) Even if the "Home Builder" model had some medical or scientific legitimacy, Clement has abused it and has taken advantage of BH for Clement's own gain in direct contravention of applicable statutes and regulations. Because of Clement's conduct, BH's therapy with Dr. Olsen has suffered and BH's treatment has been affected. These facts have been lost on Clement, who contends that she did not use BH for her own gain but does not deny that she had BH serve as her errand girl to assist Clement in picking up a car and in spending the night at BH's house.

(C) Clement believes that it is appropriate to bill in the manner she did and blames BCBS for the fraud she committed because her contract with BCBS did not provide enough coverage for all of the time she needed to spend counseling BH and SH. Her rationale is incomprehensible and shows that Clement does not and will not accept responsibility for her improper conduct. Because Clement refuses to accept responsibility for her fraudulent acts, there is no way to ensure that Clement will discontinue these improper billing practices if she is allowed to continue to practice.

(D) Clement unabashedly lashed out against BH and SH once they filed a complaint by filing an unsolicited letter with the Social Security Administration. Even if the letter had been solicited, Clement violated her professional standards of conduct by opining without recent assessment that BH was a malingerer. This shows an utter lack of disregard for the requirements of her profession and an even more disturbing lack of regard for the well-being of clients who might "cross" her by filing a licensing complaint.

(E) Clement attempted to stymie the license investigation in this case by preparing the "Declaration" document for BH and SH. Her blatant attempt to hinder the investigation demonstrates that she cannot be trusted to fulfill her obligations to the public or to her regulatory board.

16. In light of the above factors, nothing short of revocation can protect the public.

IV. RECOMMENDED ORDER

Based upon the foregoing, the hearing examiner recommends that Clement's License No. 963 be revoked.

DATED this 8th day of December, 2006.

DEPARTMENT OF LABOR &
INDUSTRY HEARINGS BUREAU

By: s/ Gregory L. Hanchett
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Mary J. Clement
696-B Northup Road
Portland, TN 37148

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental mail service.

Lorraine Schneider, Legal Counsel
Office of Legal Services
Department of Labor and Industry
P.O. Box 200513
Helena, MT 59620-0513

DATED this 8th day of December, 2006.

s/ Sandy Duncan

**BEFORE THE BOARD OF SOCIAL WORK
EXAMINERS AND PROFESSIONAL
COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA**

IN THE MATTER OF	) Docket No. CC-05-0048-
THE PROPOSED	) SWP
DISCIPLINARY	) Case No. 706-2006
TREATMENT)
OF THE LICENSE OF	) Complaint No. 2004-0005
MARY J. CLEMENT,)
A LICENSED)
CLINICAL)

FINAL ORDER

A Notice of Proposed Board Action and Opportunity for Hearing (Notice) was filed by the Department and duly served on the Licensee in this matter as appears from the record. Licensee requested a contested case hearing. Thereafter, a hearing examiner was appointed and the Department and Licensee presented their arguments and evidence over the course of a four day contested case hearing held May 25 and 26, 2006 and August 17 and 18, 2006 pursuant to the Montana Administrative Procedure Act. At the contested case hearing, Lorraine Schneider represented the Department and the Licensee appeared pro se. The hearing examiner issued and

served his Proposed Findings of Fact, Conclusions of Law and Recommended Order on December 8, 2006.

Pursuant to Section 2-4-621(1), Mont. Code Ann., an order setting a schedule for filing exceptions was issued. On January 27, 2007, the Licensee filed exceptions and the Department timely responded to the exceptions. On March 2, 2006, at a duly convened meeting, the Adjudication Panel of the Board heard argument from the Licensee and the Department on the Licensee's exceptions to the hearing examiner's Proposed Findings of Fact, Conclusions of Law and Recommended Order. The Adjudication Panel considered the parties' arguments and the entire record in the contested case.

Based thereon, the board hereby ADOPTS the hearing examiner's December 8, 2006, proposed FINDINGS OF FACT on the grounds they are supported by competent substantial evidence and the proceedings upon which the findings were based complied with essential requirements of law.

Further, the board hereby ADOPTS the hearing examiner's CONCLUSIONS OF LAW and interpretation of administrative rules on the grounds they are correct.

Based upon the Findings of Fact and Conclusions of Law, the board finds by a preponderance of the evidence appearing from the record, that Licensee violated the statutes and rules identified therein and that the following sanctions are

necessary for the protection of the public and rehabilitation of the Licensee.

NOW THEREFORE, IT IS HEREBY ORDERED, that Licensee's clinical professional counselor license # 963 is REVOKED.

DATED this 26th day of March, 2007.

s/ [signature]
Presiding Officer
Board of Social Work Examiners
and Professional Counselors

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2007, I served a true and accurate copy of the foregoing, first class, U.S. mail, postage prepaid, upon the Licensee addressed as follows:

Mary J. Clement
696-B Northup Road
Portland, TN 37148

May J. Clement
1106 W.. Park
P.O. Box 173
Livingston, MT 59047

Mary J. Clement
219 W. Callender St.
Apt. A-2-4
Livingston, MT 59047

s/ LaVelle M. Potty

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MARY J. CLEMENT, Cause No. BD-2007-329

Petitioner,

v.

**ORDER ON PETITION
FOR JUDICIAL REVIEW**

STATE OF MONTANA,
DEPARTMENT OF LABOR
AND INDUSTRY, BOARD
OF SOCIAL WORK
EXAMINERS AND PROFESSIONAL
COUNSELORS,

Respondents.

Before the Court is Mazy J. Clement's petition for judicial review of the March 26, 2007 determination of the Montana Board of Social Work Examiners and Professional Counselors (hereafter Board) revoking Clement's license to practice as a Licensed Clinical Professional Counselor. The Board conducted oral argument on March 2, 2007, and adopted Hearing Examiner Gregory L. Hanchett's December 8, 2006 Proposed Findings of Fact; Conclusions of Law; and Recommended Order (hereafter referred to as Final Order).

Oral argument was held in this Court on October 30, 2007, and Clement was allowed to file a

post-hearing brief. Based on a review of the administrative record, the briefs of the parties, and the arguments presented, the Court affirms the Final Order revoking Clement's license.

BACKGROUND

A four-day contested case hearing was held on May 25 and 26, and August 17 and 18, 2006. In December 2006, Hearing Examiner Hanchett submitted his Final Order which was adopted by the Board on March 26, 2007. The Final Order determined that Clement received her Montana license (number 963) as a clinical professional counselor in September 2000. (Final Order, at 2, ¶ 1.) Clement initially worked under the auspices of Roger Dale Barnes, PhD, in Livingston, Montana, and split her time between Montana and her home state of Tennessee. (Id., at 2, ¶ 3.)

In November 2000, Clement entered into a participating provider agreement with Blue Cross/Blue Shield of Montana (BCBSMT). (Id., at 2-3, ¶ 4.) Under that agreement, Clement agreed to accept full payment from BCBSMT with no charge to her clients who had health insurance coverage with BCBSMT. (Id.) She also agreed that she would only bill for face-to-face counseling sessions with her clients. (Id.) In February 2001, Clement began treating husband and wife, S.H. and B.H., who were BCBSMT subscribers. (Id., at 3, ¶ 5.) Their insurance policy contained an unlimited mental health benefit with no dollar limit for counseling, no co-payment, and no deductible. (Id.) Therefore, Clement's participating

provider agreement precluded her from billing B.H. and S.H. for any amounts not paid by BCBSMT. (Id.)

Clement was subject to billing codes which depended on the time she spent with B.H. and/or S.H. in face-to-face counseling sessions. Code 90804 allowed reimbursement for a twenty-five minute face-to-face counseling session. (Id., at 3, ¶ 6.) Code 90806 provided payment for face-to-face counseling sessions lasting forty-five to fifty minutes. (Id.) Code 90808 provided payment for seventy-five to eighty minutes of face-to-face counseling. (Id.) Finally, a "22 modifier" (or "Modifier 221") allowed additional payment to the counselor for an additional twenty minutes of face-to-face counseling over and above the eighty minutes allowed under code 90808. (Id.)

While Clement initially counseled B.H. and S.H. at her office, she thereafter began meeting with B.H. outside the office and billed while the two were shopping in Bozeman, recreating at Chico I-lot Springs, and driving together. (Id., at 3, ¶ 7.) The hearing examiner determined that Clement improperly billed for B.H.'s assistance in picking Clement up from the airport; spending the night at B.H.'s home; and having B.H. transport her to Pray, Montana, so Clement could pick up her car which was being held by another client. (Id., at 3, ¶ 8(A).) The hearing examiner determined that Clement did not inform B.H. that she was involved in billable counseling sessions during any of those time periods and no "recognized professionally substantive counseling occurred." (Id.)

On another occasion, Clement spent the night at B.H.'s home in Livingston while Clement was returning to Montana from Tennessee. (Id., at 3-4, ¶ 8(B).) Clement billed for this time without telling B.H. they were involved in counseling during any of this contact. (Id.)

Clement also had B.H. drive her to Bozeman to shop at Staples Office Supplies for an internet video camera so that Clement could attempt to bill for face-to-face counseling with B.H. while Clement was back in Tennessee. (Id., at 4, ¶ 8(C).)

At Clement's urging the two went shopping for a Lazy Boy recliner for B.H., and although B.H. was not informed that she was involved in counseling during this shopping spree, BCBSMT was billed for the time Clement spent with B.H.. (Id., at 4, ¶ 8(D).)

Clement also invited B.H. to attend an all-expense-paid trip to Bimini, an island in the Bahamas, which some of Clement's other clients also attended. (Id., at 4, ¶ 8(F).) This trip involved swimming with dolphins. (Id.) While Clement paid B.K.'s airfare and lodging, she billed BCBSMT without telling BE. she was providing counseling sessions during that trip. (Id.) In addition, the hearing examiner found that Clement's website was misleading as she advertised swimming with dolphins as therapeutic, even though that activity is not recognized as appropriate treatment in the field of licensed professional counseling. (Id., at 4, ¶ 9.)

The hearing examiner found that an additional improper billing situation occurred while B.H. was employed at the Starwinds Ranch located near Livingston. Clement stayed at the ranch for three days.¹ (Id., at 4, ¶ 8(G).) The hearing examiner found that Clement billed for counseling sessions with B.H. during that time period even though no counseling took place. (Id.)

The hearing examiner found that over 80 percent of Clement's billing was under the highest billing code 90808, and for many of those eighty minute sessions, Clement sought additional reimbursement using the 22 modifier; which allows an additional twenty minutes of billable time. (Id., at 4-5, ¶ 10.)

Because of Clement's persistent use of the 22 modifier, BCBSMT audited Clement's billing practices and sought reimbursement for over \$13,000 in fees that had been improperly paid to Clement. (Id., at 4-5, ¶ 10; at 6, ¶ 15.) BCBSMT also disallowed Clement from using the modifier in the future. (Id., at 4-5, ¶ 10.) Undeterred by BCBSMT's disallowance, Clements began to carry over charges she would have billed in one month to subsequent months, even though no counseling occurred in the subsequent month. (Id.) Clement admitted that carry over billing occurred approximately fourteen times. (Id.)

¹Clement may have billed other clients while she was staying at the ranch during this time period.

The hearing examiner concluded that Clement's billing practices were fraudulent in that she knew she was obtaining payment from BCBSMT for services not rendered to B.H. and S.H., and in violation of her BCBSMT contract. (Id.) Clement used a face-to-face billing code when she was speaking to B.H. and S.H. by telephone. (Id.) The hearing examiner determined that Clement knew "or should have known" that telephone services were not reimbursable. (Id., at 5, ¶ 11.)

The hearing officer also found that Clement improperly provided counseling in the presence of third persons, including a painter, and quite frequently disclosed to third parties that she was providing counseling services to B.H., without her written consent. (Id., at 5, ¶ 14.)

Soon after Clement returned over \$13,000 to BCBSMT, she filed a complaint in Park County Justice Court wherein she inappropriately sought to recoup \$2,940 from B.H. and S.H. for amounts not paid by BCBSMT. (Id., at 5-6, ¶ 15, *see also* Ex. 1(3)) After a hearing on the merits, the Park County Justice of the Peace ruled in favor of B.H. and S.H. (Id.)

In November 2003, the Board received a complaint from B.H. and S.H.. regarding Clement's improper billing, which was forwarded to Clement. A return receipt from the United States Postal Service indicated that Clement received the complaint on November 19, 2003. On the same day, she sent an unsolicited letter to the Social Security Administration claiming that B.H. was a "malingerer." (Id., at 6, ¶ 17,

citing Ex. I (2)(m).) The hearing examiner found that the sole purpose of Clement's letter to the Social Security Administration was to retaliate against B.H. for filing a complaint with the Board. (Id.)

Clement also prepared a document entitled "Declaration," which she attempted to get B.H. and S.H. to sign. (Id., at 6, ¶ 18, *citing* Ex. 1(4).) The hearing examiner determined that, among other things, the declaration attempted to get B.H. and S.H. to legitimize Clement's inappropriate billing practices. (Id.)

The hearing examiner determined that Clement violated the professional standards for licensed clinical professional counselors by, among other things: (1) providing counseling to B.H. in the presence of third persons; (2) having B.H. transport her from the airport and spending the night at B.H.'s home, and then having B.H. transport her to her car in a different Montana town; (3) shopping with B.H.; (4) taking B.H. to Bimini; (5) engaging in an "improper dual relationship" which not only had the potential to adversely affect the therapeutic relationship, but in fact did adversely affect the relationship; (6) providing numerous gifts and funds to B.H. and S.H. while treating them; (7) otherwise exploiting B.H.; (8) failing to maintain professional boundaries; (9) fraudulently billing BCBSMT; (10) using a "Home Builder" model of social work which blurred professional boundaries and created an unhealthy dual relationship with B.H.; (11) inappropriately filing a complaint against S.H. and B.H. in Park County Justice Court after BCBSMT sought reimbursement for amounts Clement

improperly billed; (12) retaliating against B.H. and S.H. because of the complaint they filed with the Board by sending an unsolicited letter to the Social Security Administration in November 2003; and (13) attempting to get B.H. and S.H. to sign Clement's declaration in an attempt to absolve Clement of her fraudulent billing. (Id., at 6-8, ¶¶ 20-26).

Based on the foregoing, the hearing examiner determined that Clement committed unprofessional conduct in violation of Section 37-1-316(4), (5), (9), (15), (18), MCA, and A.R.M. 24.219.804(1), (2). To protect the public, the hearing examiner determined that it was necessary under the circumstances to revoke Clement's license under Section 37-1-312, MCA. After oral argument, the Board concurred with the hearing examiner's determination that to protect the public it was necessary to revoke Clement's Montana license. As above-referenced, Clement moved to Tennessee where it is believed she continues to practice in that state.

The hearing examiner found that aggravating factors necessitated revocation of Clement's license, as opposed to suspension and attempted rehabilitation of the licensee. First, Clement remains convinced that the "Home Builder" model is an appropriate means of treatment, although it clearly blurs the professional relationship between the clinical professional counselor and the client. Based in part on the testimony of Patrick O'Malley, Ph.D., Kenneth Olsen, M.D., and Christine Hillegass, Ph.D., the hearing examiner determined that the model does not present a "legitimate modality of treatment in the course of licensed clinical professional counseling." (Id., at 11-12,

¶ 15(A).) Despite the testimony of those practitioners and the obvious conflicts created by the model, Clement remains convinced of its efficacy. (Id.) By using the Home Builder model, Clement abused her relationship with B.H. in direct contravention of her duties as a counselor and in violation of Montana statutes and administrative rules, although "[t]hese facts have been lost on Clement." (Id., at 12, ¶ 15(B).)

Second, Clement continues to believe that her billing practices are appropriate and blames BCBSMT for the fraud she committed because its contract does not allow full compensation for all of the time Clement claims she was required to provide treatment to B.H. and S.H.. (Id., at 12, ¶ 15(C).) Because Clement refuses to accept responsibility for her improper conduct, it is not possible to ensure that such conduct will not continue in the future. (Id.)

Third, Clement retaliated against B.H. and S.H. for filing their complaint by writing an unsolicited letter to the Social Security Administration. (Id., at 12, ¶ 15(D).) The hearing examiner found that Clement violated her professional standards of conduct by writing such a letter. (Id.)

Finally, Clement attempted to "stymie the license investigation" by preparing the "Declaration," which she attempted to get B.H. and S.H. to sign. (Id., at 12, ¶ 15(E).) The hearing examiner determined that Clement's "blatant attempt to hinder the investigation demonstrates that she cannot be trusted to fulfill her obligations to the public or to her regulatory Board." (Id.)

STANDARD OF REVIEW

A district court's review of a decision of the Board of Social Work Examiners and Professional Counselors is governed by the Montana Administrative Procedure Act (hereafter MAPA). Under MAPA, the appropriate standard of review is codified in Section 2-4-704(2), MCA, which provides,

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

In contrast to findings of fact, issues of law are reviewed by the Court to determine whether the Board's interpretation of the law is correct. *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

DISCUSSION

Section 37-1-316, MCA, defines the types of activities which are considered unprofessional conduct on the part of licensed clinical professional counselors. That statute states in pertinent part,

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

....

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

....

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

....

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal

action from being filed, prosecuted, or completed;

....

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

The applicable administrative rule further states that a licensed professional counselor shall abide by the code of professional ethics and shall not: commit fraud; misrepresent the services which will be provided; violate his/her position of trust "by knowingly committing any act detrimental to a client;" exploit a client in any way; or engage in deceptive or misleading advertising. A.R.M. 24.219.804. Except as required by law, a counselor must obtain the client's "written consent prior to releasing confidential information." *Id.* Finally, A.R.M. 24.219.2305 prohibits a counselor from intentionally causing physical or emotional harm to a client.

In requesting review of the Board's revocation of her license, Clement makes numerous arguments as to alleged violations of her constitutional and statutory rights. The Court will address those arguments which

it believes are viable and will ignore those arguments which are not.

First, Clement argues the Board violated her rights to procedural due process by withholding documentation which was allegedly provided to the screening panel by BCBSMT.

Second, Clement argues that because this matter involves the revocation of a professional license, the Board should have used the clear and convincing evidence standard of review, instead of the preponderance of the evidence standard. (Br. Opp'n Resp't Mot. Summ. J., at 8, *citing* In re Tinklenberg, 716 N.W.2d 798, 802 (S.D. 2006); Billings v. Wyo. Bd. of Outfitters & Prof'l Guides, 88 P.3d 455, 462 (Wyo. 2005); State ex rel. Olka. State Bd. of Exam'rs of Certified Shorthand Reporters v. Parrish, 152 P.3d 202, 203 (Okla. 2006); Gray v. Super. Ct., 23 Cal.Rptr.3d 50, 56 (Cal. App. 2005); Nair v. Dep't of Business & Prof'l Regulation, 654 So.2d 205, 207 (Fla. App. 1995)).

Third, Clement argues that because her BCBSMT contract was silent as to billing for overtime, her billing practices were in compliance with her BCBSMT contract. Response Oncology v. Blue Cross & Blue Shield of Mo., 941 S.W.2d 771, 777 (Mo. App. 1997). Therefore, Clement's billing does not constitute billing fraud. In addition, if Clement was mistaken in her billing practices, she did not knowingly commit fraud. In re Estate of Kindfather, 2005 MT 51, ¶ 17, 326 Mont. 192, ¶ 17, 108 P.3d 487, ¶ 17.

Finally, Clement argues that the definition of "harm" to a patient is unconstitutionally vague under Section 37-1-316, MCA, and A.R.M. 24.219.804.

The Court rejects each of Clement's arguments. The Court believes that Clement was given ample warning of what conduct was prohibited, and the record reflects that all of the information that was provided to the screening panel was provided to Clement, together with notice of the nature of the complaints that had been made against her. The statutory and administrative provisions governing the conduct of clinical professional counselors also provides sufficient notice of what types of counselor/patient activities are required, and what activities are precluded. After reviewing the administrative record, the Court is convinced that the Board's findings of fact are supported by substantial evidence, and its conclusions of law are correct.

The record is clear that Clement inappropriately billed BCBSMT and was required to reimburse over \$13,000 in benefit payments she received for alleged face-to-face treatment of B.H. and S.H.. By use of the "Home Builder" social work model, Clement blurred the clinical professional counselor/patient relationship to her clients' detriment. While out-of-office treatment may be appropriate on occasion under specifically regimented circumstances, Clement abused the billing process by becoming friends with her clients. Instead of providing appropriate counseling services, Clement took B.H. shopping, had her run errands, and failed to disclose when billable counseling services were being provided.

After being required to reimburse BCBSMT for amounts she should not have billed, Clement inappropriately filed a complaint against B.H. and S.H. in the Park County Justice Court seeking reimbursement for \$2,940 in benefits "for amounts not paid by insurance." (Ex. 1(3)) The justice court properly dismissed that complaint, as Clement was not entitled to any reimbursement from B.H. and S.H. for amounts not paid by BCBSMT.

After B.H. and S.H. filed their complaint with the Board, Clement attempted further retaliation against B.H. by sending an unsolicited letter to the Social Security Administration claiming B.H. was a malingerer. That unsolicited letter violated the clinical professional counsel/patient relationship and should not have been sent without B.H.'s written authorization. Clement clearly violated Section 37-1-316(15), MCA, as the letter was a form of harassment directed at a person who has filed a complaint with the Board. This Court also believes that the letter constituted a clear violation of Sections 37-1-316(9) and 37-22-401, MCA, because it revealed confidential and privileged information about RI-J. without her consent.

Perhaps most egregious and overreaching is Clement's preparation of her "Declaration" which she attempted to have B.H. and S.H. sign to validate her justice court complaint and her fraudulent billing of BCBSMT. The declaration states in pertinent part, "The amount requested by Mary Clement in Justice Court, \$2,940, is only a portion of the total expenses from [Clement's] telephone services. . . . BCBSMT told

us to completely cooperate or we would also be charged with fraud." (Ex. 1(4).) The hearing examiner found that Clement's attempt to get her former clients to sign the declaration was a "blatant attempt to hinder the investigation." This Court believes it was also a blatant abuse of the clinical professional counselor/patient relationship. Similar to a doctor/patient relationship, B.H. and S.H. had placed their trust in Clement, and Clement leveraged and abused her position of power by requesting that her clients fabricate the facts leading to the complaint in an attempt to condone Clement's sanctionable acts and omissions.

Even applying a more strict clear and convincing standard of review, the Court agrees with the Board that Clement's license should be revoked. Clement improperly billed BCBSMT for counseling on dates when no counseling took place and billed for face-to-face counseling which occurred over the phone. The record reflects that Clement's inappropriate billing was done knowingly and with an intent to deceive. B.H.'s psychiatrist, Dr. Kenneth Olson, testified that Clement's fraudulent billing broke the trust she had developed with B.H. and made it difficult for B.H. to trust other counselors. (Tr. of Proceeding, at 189-90.) Therefore, the finding that Clement committed billing fraud is correct. Clement's billing practices also constitute clear violations of Section 37-1-316(4) and (5), MCA, and A.R.M. 24.219.804(a), referenced above.

Clement's use of the Home Builder model creates a dual relationship which led to blurred professional boundaries and inappropriate requests by

Clement that B.H. run errands for her, including picking her up at the airport, staying the night at B.H.'s house, and driving Clement to another city to pick up her car. Clement's gifts to B.H. and S.H. were also inappropriate and violated her professional relationship with those clients. This conduct is below the "generally accepted standards of practice" required by Montana clinical professional counselors under Section 37-1-317(18), MCA.

This Court further concurs with the Board's determination that Clement violated Sections 37-1-316(15) and 37-22-401,² MCA, by allegedly providing counseling to B.H. in the presence of third parties and in violating B.H.'s right to confidentiality by acknowledging that Clement was providing counseling services to B.H. without her written consent.

Finally, the Court agrees that Clement's advertising on her website that "swimming with dolphins" was therapeutic violates A.R.M. 24.219.804, as Clement failed to prove that there is a "validated treatment modality in licensed clinical professional counseling which substantiates such a claim." (Final Order, at 11, ¶ 11.)

Because of the egregious nature of Clement's multiple and vindictive violations of the appropriate

²The Board incorrectly cited Section 37-22-301, MCA, instead of Section 37-22-401, MCA, regarding privileged communications.

standards of practice, and because Clement remains convinced that her treatment and billing methods are appropriate, the Board had no other choice than revocation of Clement's Montana license to protect the public. Section 37-1-312(2), MCA. In addition, Clement's actions in filing a complaint against her clients in justice court, her retaliatory letter to the Social Security Administration, and her attempt to get her clients to sign the declaration would be seen as contemptible by any reasonable professional in a position of power over a client who was seeking emotional guidance and solace.

CONCLUSION

For the foregoing reasons, the Montana Board of Social Work Examiners and Professional Counselor's March 26, 2007 Final Order adopting the hearing examiner's December 8, 2006 Proposed Findings of Fact; Conclusions of Law; and Recommended Order is **AFFIRMED**.

DATED this 11 day of January 2008.

s/ J. Sherlock
JEFFREY M. SHERLOCK
District Court Judge

pcs: Mary J. Clement
Don E. Harris

37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

- (1) conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending;
- (2) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;
- (3) fraud, misrepresentation, deception, or concealment of a material fact in applying for or assisting in securing a license or license renewal or in taking an examination required for licensure;
- (4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;
- (5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;
- (6) offering, giving, or promising anything of value or benefit to a federal, state, or local government employee or official for the purpose of influencing the employee or official to circumvent a federal, state, or

local law, rule, or ordinance governing the licensee's profession or occupation;

(7) denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal, under judicial review, or has been satisfied.

(8) failure to comply with a term, condition, or limitation of a license by final order of a board;

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

(10) addiction to or dependency on a habit-forming drug or controlled substance as defined in Title 50, chapter 32, as a result of illegal use of the drug or controlled substance;

(11) use of a habit-forming drug or controlled substance as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally;

(12) having a physical or mental disability that renders the licensee or license applicant unable to practice the profession or occupation with reasonable skill and safety;

(13) engaging in conduct in the course of one's practice while suffering from a contagious or infectious disease involving serious risk to public health or without taking adequate precautions, including but not limited to informed consent, protective gear, or cessation of practice;

(14) misappropriating property or funds from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property or funds;

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

(16) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice by use of the licensee's license;

(17) failing to report the institution of or final action on a malpractice action, including a final decision on appeal, against the licensee or of an action against the licensee by a:

(a) peer review committee;

(b) professional association; or

(c) local, state, federal, territorial, provincial,
or Indian tribal government;

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

24.219.804. CODE OF ETHICS - LICENSED PROFESSIONAL COUNSELORS

(1) Pursuant to 37-22-201 and 37-23-103, MCA, the board hereby adopts the following professional and ethical standards for licensed professional counselors and licensed social workers to ensure the ethical, qualified, and professional practice of social work and professional counseling for the protection of the general public. These standards supplement current applicable statutes and rules of the board. A violation of the following is considered unprofessional conduct as set forth elsewhere in rule and may subject the licensee to such penalties and sanctions provided in 37-1-136, MCA.

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

(ii) divide a fee or accept or give anything of value for receiving or making a referral;

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

(iv) exploit in any manner the professional relationships with clients or former clients, supervisees, supervisors, students, employees, or research participants;

(v) engage in or solicit sexual relations with a client, or commit an act of sexual misconduct or a sexual offense if such act, offense or solicitation is substantially related to the qualifications, functions, or duties of the licensee;

(vi) condone or engage in sexual harassment. Sexual harassment is defined as deliberate or refuted comments, gestures, or physical contact of a sexual nature that are unwelcome by the recipient;

(vii) discriminate in the provision of services on the basis of race, creed, religion, color, sex, physical or mental disability, marital status, age or national origin;

(viii) provide professional services while under the influence of alcohol or other mind altering or mood altering drugs which impair delivery of services; or

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

(ii) terminate services and professional relationships with clients when such services and relationships are no longer required or where a conflict of interest exists;

(iii) make every effort to keep scheduled appointments;

(iv) notify clients promptly and seek the transfer, referral, or continuation of services pursuant to the client's needs and preferences if termination or interruption of services is anticipated;

(v) attempt to make appropriate referrals pursuant to the client's needs;

(vi) obtain informed written consent of the client or the client's legal guardian prior to the client's involvement in any research project of the licensee that might identify the client or place them at risk;

(vii) obtain informed written consent of the client or the client's legal guardian prior to taping, recording, or permitting third party observation of the client's activities that might identify the client or place them at risk;

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information; and

(ix) disclose to and obtain written acknowledgement from the client or prospective client as to the fee to be charged for professional services and/or the basis upon which the fee will be calculated.

24.219.2305. UNPROFESSIONAL, CONDUCT FOR PROFESSIONAL COUNSELORS

(1) Violation of any of the following constitutes unprofessional conduct:

(a) Misrepresent the type or status of license held by the licensee.

(b) Intentionally cause physical or emotional harm to a client.

(c) Misrepresent or permit the misrepresentation of his or her professional qualifications, affiliations or purposes.

(d) Have sexual relations with a client, solicit sexual relations with a client or to commit an act of sexual misconduct or a sexual offense if such act, offense or solicitation is substantially related to the qualifications, functions or duties of the licensee.

(e) Engage in sexual acts with a client or with a person who has been a client within the past 18 months. A licensee shall not provide licensed professional counselor services to a person with whom the licensee has had a sexual relation at any time.

(f) Perform or hold himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training and/or experience.

(g) Permit a person under his or her supervision or control to perform or permit such person to hold himself or herself out as competent to perform professional services beyond the level of education, training and/or experience of that person.

(h) Prior to the commencement of treatment, fail to disclose to the counselee, or prospective counselee, the fee to be charged for the professional services, or the basis upon which such fee will be computed.

Mary J. Clement
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Portland, TN 37148
Phone & Fax: 615-206-1553

BY NANCY SWEENEY
DEPUTY

Pro Se

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

Mary J. Clement,)	
)	
Petitioner,	)	Cause No. BDV-2007-329
)	
vs.)	
)	
STATE OF MONTANA,	)	PETITION FOR JUDICIAL
DEPARTMENT LABOR	)	REVIEW
AND INDUSTRY,)	
BOARD OF SOCIAL)	
WORK EXAMINERS)	
AND PROFESSIONAL)	
COUNSELORS)	
)	
Respondent)	

PETITION FOR JUDICIAL REVIEW

COMES NOW, MARY J. CLEMENT ("Clement"
or "Petitioner") representing herself, pro se, and by

way of this Petition for Judicial Review states and alleges as follows:

I

The Court has jurisdiction over this matter pursuant to M.C.A. 2-4-702.

II

Venue is proper in Lewis & Clark County because this is the county in which the State Agency maintains its principal office.

III

This case began in December 2002, in Livingston, Montana when a client ("BH") called her counselor, Clement, and requested half of the funds of monies earned from Blue Cross and Blue Shield of Montana ("BCBSMT") be paid to the client. Initially, Clement was in shock and, thus, did not respond immediately. BH then changed her demand to (1) request that Clement return the last check issued by BCBSMT to BCBSMT and (2) return BH's phone call within 72 hours or BH would file a complaint with BCBSMT and the Board of Social Work Examiners and Professional Counselors (the "Board"). Clement was appalled by this behavior, especially after working off and on with this troubled client for nearly two years and after approximately 200 hours of services rendered. Clement did not meet BH's 72-hour demand.

Ultimately, Clement did return the last check (for about \$3,000 for counseling in September and October 2002) and talked with Dr. Barnes, her Tennessee supervisor. Dr. Barnes and Clement hoped that BH would review the disputed billing while Clement was visiting Montana. Even though Clement discharged BH and her husband, SH, (collectively "the clients") in December 2001, the crisis driven BH sought Clement's services by saying that she had attempted suicide, attempting to reestablish counseling with Clement in Tennessee via the phone and when Clement visited Montana for workshops in March/April 2002. BH repeated similar behavior when Clement visited Montana in the June through August 2002. Amazingly, there were no complaints about billing until December 2002 when Clement refused to participate in an illegal act of giving kickbacks.

BH and SH's formal complaint to the Board was dated October 16, 2003 and received in the office on November 4, 2003. A certified letter with return receipt was sent to Clement. It was signed but not dated. It was stamped Nashville, not Portland, where Clement would have received her mail on or after November 19, 2003 when she returned from Montana and where there was a hearing in Justice Court, November 17, to have BH and SH's personal liability for telephone counseling pay.

On December 1, 2003, Clement responded to the 2-page Board complaint, which made essentially two major allegations. The first was that BH and SH did not know Clement was billing for time "many months after [BH and SH] had terminated" the relationship.

This assertion is undermined by the fact that BH and SH received a bill every 20-30 days from BCBSMT demonstrating what had been billed and paid. Importantly, when Clement personally saw BH and SH in October 2002, they did not complain about any overbilling. The second complaint was that BH and SH were being held responsible for phone counseling initiated by BH to Clement when Clement moved to Tennessee. BH and SH did not voice concern over the invoices submitted to BCBSMT, but waited until Clement sought payment from BH and SH to argue that they were just friends with Clement. They made this assertion despite a signed for agreement with Clement.

Unbeknownst to Clement, BCBSMT interviewed BH and SH and took erroneous information and considered these items as facts. On July 24, 2004 BCBSMT forwarded their findings to the state agency to the screening panel that met in early September 2004. (See Attachment #5 A-S that equals nearly two inches of materials with the same being used for the hearing in the Department's Exhibits.)

BCBSMT filed no written complaint with the Board, nor did it give information to Clement to refute prior to the screening panel meeting, even though Clement had a written request to BCBSMT in April 2004 for addition information to resolve the billing errors.

In September 2005, the Board filed and served a notice of proposed board action and opportunity for hearing, claiming five alleged violations of MCA

37-1-316, one alleged violation of MCA 37-22-301, and three alleged violations under (2) (a) and (b) of ARM code of ethics 24.219.804. Interestingly, the scheme for these violations was not adopted by the Board until August 21, 2003.

The Petitioner requested a contested ease hearing. A hearing examiner was appointed. Thereafter, on November 7, 2005, the Board sent Clement all the information "reviewed by the Screening Panel of the Board," including the materials from BCBSMT. Once Clement saw the interviews of BH and SH on July 17, 2003, Clement created materials to correct the misinformation previously provided. She noted seven major false accusations in that interview including SH's statements that he "may have seen Clement five times" in 2001 when Clement had session notes and progress notes that showed 28 sessions beginning in September in the office and crisis intervention therapy in the home. When SH called Dr. Olson, the psychiatrist, to have BH hospitalized as he had been done twice before, Dr. Olson refused. SH then called Clement who did crisis intervention and on the last evening of home visits called the police herself to help SH leave the house for BH to calm clown and let her anger subside over his use of a controlled substance.

Clement's 3-inch notebook with information supported by affidavits, other secondary documents and the October 25, 1999 MMPI taken by BH in Dr. Olson's office was supplied to help BCBSMT resolve the billing issues and for BCBSMT to recognize the

potential inaccuracies of BH's statement, given her personality disorder.

A copy of the notebook was given to the Board's attorney. The purpose was to reach an agreement of settlement before the Board's hearing. Although Clement was willing to make an effort to settle, the Board's attorney wanted confessions to acts that Clement thought were untrue, unreasonable, and unfeasible, e.g., like not having people from Montana see the website on the FDA registered biofeedback device, the EPFX (QXCI).

On April 28, 2006, Clement filled a Motion to Strike and/or for a More Definite Statement because it was hard to determine what the specific charges were from the statements of alleged facts. Because the charges lacked clarity, one specific charge, the charge of Use advertising, became a moving target. Clement stated "In the charges in paragraph 10, the Board implies that it is unprofessional conduct to use the QXC/EPFX (a biofeedback device) and advertise the use thereof." Clement asked: "Is this unprofessional conduct to use an FDA registered biofeedback device? If so, then this should be stated" as an official policy. "Further, can this action rely on the hearsay opinion of a possibly biased medical doctor, who apparently will not be used to testify, as a ground for finding unprofessional conduct by using such device? Blue Cross and Blue Shield of Montana do have a biofeedback policy. If they are the ones who will not accept biofeedback from certain machines, shouldn't they be the ones to determine that instead of the Board?"

Clement further questioned the charges made with respect to her website established in 2004 in Tennessee: "How can material outside licensure *per se* be unprofessional such as offering to take people on a wild dolphin swim?" The Hearing Officer never granted the request of more definite statement.

The contested ease hearing was held May 25-26 and August 17-18, 2006. Closing arguments presented by the Board focused on the five allegations set forth above. Clement argued that the Department failed to prove their case and gave insufficient notice of the specific charges. Clement argued that she provided intense crisis intervention, tasked orientated and behavioral therapy that focused on life management for more adaptive social functioning—the suggested treatment by the MMPI results . Moreover, Clement noted that the clients were not eligible from other social agencies for these services because of his salary even though they were indigent due to her gambling, alcohol and drug debts. Thus, Clement, due to the exigent emergency circumstances of the clients in crisis, had no option but to move forward.

Clement argued that the letter she wrote on November 19, 2003, to Disability Determination Services was a separate agency of the State and did not interfere with the disciplinary process relative to the license and was based upon BH's behavior at the Justice Court seen on November 17, 2003 and not because of a receipt of the clients' complaint to the Board supposedly received on November 19, 2003. She argued that information given in front of the judge led

Clement to believe that BH was not physically disabled.

Petitioner also argued that there was no intention to defraud BCBSMT to provide needed services for the clients, *but* there was a problem in getting information from BCBSMT on how to bill for the overtime to the counseling. BCBSMT was "new" at using a 22-modifier to CPT codes (units of time used for billing purposes such as CPT 90806=45-50 minutes) and had not promulgated its rules or standards to providers in a clear and concise manner equitable to all providers of services. Whether they meant to or not, BCBSMT was taking advantage of the ethical standard imposed on counselors that counselors cannot abandon the clients and are responsible for how the session ends, to get free services when it dealt with troubled clients like BH and SH. Furthermore, Petitioner noted that BCBSMT had no internal grievance process for reviewing billing errors and by-passed the required due process procedures of the State as well by sending their investigation to the State without notice to Clement.

On another charge Petitioner argued that she never received notice as to what constitutes Use advertising on a website and what exact words were misleading. It was as if the whole website was in violation even though there was an obvious disclaimer for the wild dolphin swim as a stand alone category of the entire website that showed many services that Clement provided, (i.e., legal services and biofeedback).

Clement argued that in light of the violations of due process, unsupported accusations, the State's unwillingness to allow a key witness for cross-examination, the Department's position unduly influenced by the dynamics of BH's borderline personality disorder and the pressure by BCBSMT, the case should be dismissed in its entirety. In particular, at the hearing, Dr. Olson gave testimony on behalf of the state. Dr. Olson claimed that Petitioner harmed BH as now BH no longer trusted counselors. Since that behavior is characteristic of borderline personality disorders, Clement tried to ask Dr. Olson about the psychologist who had worked with BH prior to Clement and had diagnosed BH as borderline, Dr. Olson refused to answer questions by Clement hiding behind the client's privilege and the name of his attorney six times before the hearing officer called an end to the questioning. This alleged harm was exactly what all counselors prior to Petitioner and Petitioner had to deal with in treating BH. Indeed, the mistrust was in her medical files. Yet, testimony from Clement's experts supported that fact that BH had not been hospitalized since Clement's work and could hold a job for over 1 year.

Clement argued that Dr. Olson's testimony should be struck or that Clement had a right to cross-examine him. The hearing officer should have held him in contempt or given a temporary recess for Olson to get his documents and his glasses so he could read the materials given to for a full cross-examination.

The Department replied October 13, 2006. The hearing officer wrote his proposed findings of fact, conclusions of law and recommended order on December 8, 2006. He recommended revocation of the license. By January 20, 2007, Clement wrote her objections to proposed findings and the Department filed their response to exception on February 12, 2007,

The Board met on March 2, 2006 and accepted the hearing examiner's findings of fact and conclusions of law even though the members raised issues that were never part of the charges or the hearing. A letter stating the results was mailed on March 30, 2007 to the Petitioner.

Clement is aggrieved by the final written decision to revoke her professional clinical counselor license. Having exhausted all administrative remedies available within the Board, she requests pursuant to MCA 2-4-702 to move the Court to review this contested case.

IV

The Petitioner herein seeks judicial review of the Board's recommendation of revocation of her license pursuant to (1) M.C.A. 2-4-704(2)(a)(i); (2) M.C.A. 2-4-704(2)(a)(ii); (3) M.C.A. 2-4-704(2)(a)(iii); (4) M.C.A. 2-4-704(2)(a)(iv); (5) M.C.A. 2-4-704(a)(v); and (6) M.C.A. 2-4-704(2)(a)(vi).

- 1) **The Board's actions violated M.C.A. 2-4-704(2)(a)(i) as the findings were**

**made in violation of constitutional
and statutory provisions.**

Specifically, the Board's actions violated the Petitioner's due process rights, violated her First Amendment rights to freedom of expression and religion, and effectively rendered Petitioner an involuntary servant.

First, the Board permitted BCBSMT to submit materials directly to the Board without filing a complaint against Petitioner. The screening panel reviewed over two inches of material that had previously not been seen by Clement. This material was unduly prejudicial and essentially created two trials within the one hearing—(a) one dealing with the Board's complaints; and (b) the second one addressing the erroneous information submitted to BCBSMT's investigation.

The Board further violated Petitioner's due process rights when it held Petitioner to a standard that had not been heretofore adopted in Montana. The Board has not adopted any professional counseling association's ethical standards and therefore are limited only to what standards they have stated in that which they have promulgated because there are difference among professional groups and to hold counselors accountable without notice is a violation of due process. Thus, in ruling that the crisis intervention, task oriented counseling and behavior modification therapy under the trade name "Home Builders Model" is "not a recognized modality of treatment in the licensed clinical professional

counseling arena" (p. 2, #2, lines 6-6 of the hearing officer's proposed finding of fact), despite its acceptance as part of Petitioner's training, acceptance of the model through the course work it accepted in licensing Petitioner, and acceptance in the practicums that Petitioner underwent in getting her license. Moreover, the Board's rules were not promulgated until after August 21, 2003 and much of the Board's complaint stems from counseling done prior to the rules promulgation, in 2002.

Moreover, the charges filed by the Board's screening panel lacked sufficient notice to convey the actual charges under which Petitioner was persecuted. To wit, at the hearing a variety of issues were discussed and addressed, but completely different issues were addressed in the Board's recommendation. Specifically, the Board stated at the hearing that Clement could not be an "alternative counselor" in Montana, as advertised on Petitioner's website. The Board, however, never gave a definition or notice of what is "alternative counselor" when the words, as used in Tennessee, where Petitioner is resident, merely means that the counselor will work with people from different religious denominations and not just Christians. The effect of the Board's actions was to deny Petitioner her right to freedom of religion.

Likewise, the Board violated Petitioner's rights to freedom of expression in ruling that Petitioner's website was misleading as she offered "wild dolphin swims" offered on Petitioner's website. The Board did not recognize that this activity was not associated with

her counseling license, and had the information placed in a completely different section of the website.

The Board further violated Petitioner's constitutional right against involuntary servitude. Specifically, the Board's ruling essentially makes counselors hostage to clients who are in need of critical care. The Board's ruling permits BCBSMT to claim that clients who go over their time limit for counseling are free to the insurance company and the client, because when the contract is silent as to how a counselor is to submit their billing. In such circumstances, BCBSMT is using the counselor's ethical standard to meet the needs of the client and not paying counselors, instead of developing clear practices for clients who are difficult and demanding due to childhood traumas and go overtime.

2) The Board's actions violated M.C.A. 2-4-704(2)(a)(ii) as the Board's actions were in excess of the agency's statutory authority.

Specifically, the Board's charges lacked definition, persecuted a counselor who used money for therapeutic purposes where the use is permitted because it is not prohibited by the American Counseling Association and other professional counseling associations ethical standards; used a subjective view of the role of a counselor; failed to provide notice of unacceptable counseling practices, and fails to publicize prohibitive therapies, allowing the Board to repeatedly change the rules available to interpretation.

3) The Board's actions violated M.C.A. 2-4-704(2)(a)(iii) as they were made upon an unlawful procedure.

The entire process, from the screening panel's review to the Hearing Officer's failure to allow testimony, was flawed and in violation of the outlined procedures. The Hearing Officer did not permit the Petitioner's witnesses to answer all questions posed, e.g., the handwriting expert and Dr. Barnes. Moreover, the Hearing Officer also limited the time within which other witnesses' testified by interrupting their testimonies for other housekeeping activities.

Additionally, the screening panel's charges lacked definition. The administration of the rules changed throughout the hearing—so much so that the false advertising on the website was first with the QXCI (an FDA registered biofeedback device), then the business card, and then back to the website where wild dolphin swims are listed in a stand along category as a retreat. Nevertheless, the Hearing Examiner stated: "There is no substantial evidence the swimming with dolphins is recognized as therapeutic treatment in licensed clinical professional counseling. This makes Clement's web site misleading" (#9, page 4 of the hearing officer's proposed finding of fact). Unfortunately, the Hearing Examiner misread the website. The dolphin swims were not listed under therapeutic services or counseling services.

The Hearing Officer also permitted Dr. Olson to fail to comply with Petitioner's subpoena, to fail to produce records to which Dr. Olson could refer, and to

bring his reading glasses, effecting precluding Dr. Olson's cross-examination.

- 4) The Board's actions violated M.C.A. 2-4-104(2)(a)(iv) as they were affected by other errors of law.**

The Hearing Officer failed to recognize Tennessee law, which states that confidentiality is broken when information is given in the presence of a stranger and the disclosure is necessary to prevent the former client from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another (RPC 1.6(b)(1)). The Hearing Officer repeatedly shifted the burden of proof and persuasion to the Petitioner. And, the Hearing Officer failed to properly apply evidentiary rules.

- 5) The Board's actions violated M.C.A. 2-4-704(2)(a)(v) as the actions are clearly erroneous in light of the reliable, probative and substantial evidence of the whole record.**

The Hearing Officer repeatedly ignored substantial evidence put before him. For example, the Hearing Officer failed to fully consider the expert witness and other witnesses of the Petitioner. To wit, Dr. Olson's nurse gave a vivid description of how difficult BH was to work with and asked the Petitioner to go to the home of BH, check her welfare, and encourage her to take her medication on several occasions from August through December 2001, so as

to avoid calling the police and writing her a disengagement letter. Yet, the Hearing Officer accepted Dr. Olson's statement that BH no longer trusted counselors (same exact words used with the nurse in 2001) to establish that the counselor did harm to the client after 2002.

- 6) The Board's actions violated M.C.A. 2-4-704(2)(a)(vi) as the actions are arbitrary, capricious, characterized by abuse of discretion, or a clearly unwarranted exercise of discretion.**

Here, the Board members at the hearing presented other charges, charges never stated at the hearing, in the complaint, or raised before the Hearing Examiner. Moreover, the Board members accepted the hearing officer's conclusions of facts and law, even though one of the members agreed that the facts cited in finding number 11 by the Petitioner was the "standard" way to bill for phone calls and negated the hearing officer's proposed finding of fact of fraudulent billing of phone calls. Additionally, the Board did not follow its own rules of procedure at the hearing.

The Hearing Officer made assumptions, never asked questions to clarify his assumptions, and then asserted them as facts, and discounted Petitioner's expert witnesses based upon erroneous information presented by the Agency.

Lastly, the entire process from notice to charges to hearing and then final acceptance by the Board was

not congruent and the charges were never consistent in content.

V

The Petitioner further requests a stay of the final decision until such time as this Petition for Judicial Review can be heard.

Wherefore, the Petitioner prays:

- 1) that the decision of the Board of Social Work Examiners and Professional Counselors of March 2, 2007, be reversed by the Court, and
- 2) for such other and further relief as the Court deems just and proper.

Dated this 25th day of April, 2007.

Respectfully submitted,

By: s/ Mary J. Clement
Mary J. Clement, *Pro Se*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April 2007, I caused a true and accurate of the foregoing document was sent by US mail, postage prepaid and addressed as follows:

Don Harris, Attorney

**Board of Social Work Examiners and
Professional Counselors
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Pro Se

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

Mary J. Clement,)
)
Petitioner,	) Cause No. BDV-2007-329
)
vs.	) BRIEF IN SUPPORT
	) OF PETITION FOR
STATE OF MONTANA,	) JUDICIAL REVIEW
DEPARTMENT LABOR)	
AND INDUSTRY,)
BOARD OF SOCIAL)
WORK EXAMINERS)
AND PROFESSIONAL)	
COUNSELORS)
)
Respondents.)

STATEMENT OF THE CASE AND
PROCEDURAL HISTORY

The Petitioner, Mary J. Clement, as a licensed clinical professional counselor, met B.H. in February

2001 and her husband, S.H., in September 2001, and counseled B.H. and S.H. on a variety of personal issues. The counseling occurred in the in the Petitioner's office, in the clients' home, and at other locations where problems arose. Such counseling was necessary due to crises being experienced by B.H. and S.H., as defined by the clients or the clients' psychiatrist Dr. Kenneth Olson. Clement terminated the counseling relationship when she moved to Tennessee at the end of December 2001. B.H. reestablished the relationship by calling Clement in Tennessee, claiming that B.H. had attempted suicide. Clement worked with both B.H. and S.H. in March and April 2002, and then returned to Tennessee, where B.H. maintained the relationship through telephone counseling. During late June, July, and through mid-August 2002, Clement worked with B.H. and S.H. through crises, fights, and threats of divorce, while helping the clients to regain control over their trashed house. The counseling relationship ended with the completion of the goals of treatment in August 2002, and no future appointments were made by the clients. B.H. reestablished counseling services for a week in September 2002, and then again in late October 2002, after she had begun a thirty-hour-per-week job as a cook for a ranch.

B.H. and S.H. filed a complaint with the Montana Board of Social Work Examiners and Professional Counselors (hereinafter collectively referred to as "Board") on November 4, 2003. The complaint was based upon two major concerns: (1) billing Blue Cross and Blue Shield of Montana "BCBSMT" for overtime in counseling sessions with

reference to dates other than when the services were rendered (a customary practice called "carry over") and (2) charging B.H. and S.H. for telephone counseling not covered by BCBSMT, wherein B.H. called the Petitioner from Montana and reestablished the terminated counseling relationship with Clement, after Clement had permanently moved to Tennessee in late December 2001. The complaint was filed because B.H. and S.H. were to appear in Justice Court on November 17, 2003, respecting a case in which Clement was asking B.H. and S.H. to pay for the services not covered by BCBSMT—the telephone counseling. B.H. and S.H. argued in their complaint that the telephone counseling never occurred.

The provider contract between BCBSMT and the Petitioner, pursuant to which the Petitioner furnished the counseling services to B.H. and S.H., was silent as to a provider's entitlement to overtime compensation for sessions necessarily running longer than the seventy-five minutes established by BCBSMT Code 90808. (See Transcript of Proceedings before Board, May 25, 2006 [hereinafter "Tr. 5/25/06"], at pp. 29-30.) BCBSMT admitted its lack of knowledge about the use of what it deemed the "22 modifier" for overtime compensation, and stated that Clement was the first counselor to inquire about its use. (See Transcript of Proceedings before Board, August 17, 2006 [hereinafter "Tr. 8/17/06"], at p. 16, l. 22 to p. 17, l. 23.) The Petitioner was never informed that she should not employ carry-over billing for sessions which were required to run over the allotted time established by BCB SMT's billing codes. (See Transcript of Proceedings before Board, May 26, 2006 [hereinafter

"Tr. 5/26/06"] at p. 219, 11. 8-25; tr. 5/25/06, at p. 37, 11. 13-18; p. 38, 11. 1-4.)

On November 19, 2003, the Board furnished Clement with notice, by certified mail, of the complaint filed by B.H. and S.H. On December 1, 2003, Clement transmitted materials to the Board responsive to the complaint. On July 26, 2004, BCBSMT submitted materials to the Screening Panel. An investigator for the Board called Clement and asked for additional information to provide to the Screening Panel. There was no interview. Clement sent the requested materials on August 22, 2004. Clement was unaware the BCBSMT had already furnished materials to the Screening Panel, because BCBSMT had not responded to Clement's April 2004 letter requesting more information on some of the findings set forth in BCBSMT's March 2004 letter. (See Tr. 5/26/06, at pp. 76-80.) The Screening Panel met in September 2004, without permitting Clement to speak. The Petitioner then became aware that the Board possessed information that was being used against her, which she could have refuted with documentation had she been given notice of the issues and an opportunity to be heard.

Following the Screening Panel's meeting, the Board asserted twenty-seven facts, with five charges set forth under Mont. Code Ann. § 37-1-316, one charge under § 37-22-301, and six charges under Mont. Admin. R. 24.219.804, the Code of Ethics. False advertising was listed as a charge under § 37-1-316 and Rule 24.219.804, but the charges were not connected to specific facts, so the Petitioner had no

notice of what issues were to be addressed. The charges included an allegation that the Petitioner had billed for counseling services on dates when she provided no such services. Regarding this charge, the record contains testimony from experts in the field of counseling explaining that Clement did provide services on the dates at issue, because a counselor's services can and should be furnished at locations and under circumstances where they are needed by the client. (See Tr. 5/26/06, at pp. 211-213.) These services were provided on the occasion when S.H. drove the Petitioner to pick up a car from another person, when the Petitioner drove B.H. to Staples in Bozeman, when the Petitioner took B.H. to a used furniture store to inquire about a new recliner for B.H.'s home, and when Clement was working at the same workplace as B.H. and B.H. approached Clement in Clement's office on a daily basis. At each of these times, B.H. demanded that the Petitioner engage in professional interaction, including the development of factual background pertinent to matters directly bearing upon B.H.'s well-being. Moreover, all these counseling services were rendered in the summer of 2003 as part of the crisis intervention necessary to enable B.H. and S.H. to cooperate with each other in order to clean up their filthy house. Such activity by the Petitioner clearly falls within the definition of counseling. Clement strove to satisfy her ethical obligation to provide B.H. with the contact and services necessary to meet B.H.'s significant needs. It is noteworthy that B.H. had threatened suicide on numerous occasions while under the care of several professionals, including Clement. Clement would have been derelict in her professional duties if she had abandoned B.H. under such

circumstances. Clement had nothing in common socially with B.H. or her husband, and the Petitioner possessed no motivation to spend time with B.H. other than to counsel her professionally. The Petitioner billed BCBSMT only for counseling and behavior-modification services provided to B.H. and S.H. No "life support skills" provided by the Petitioner, although beneficial to B.H., were ever billed to the insurer. (Screening Panel Exhibit 1(2), 4, 11. 1-2; Tr. 5/25106, at p. 32, 11. 14-24; p. 33, 11. 24-25; p. 35, 11. 1-20.) Given B.H.'s diagnosed Borderline Personality Disorder and her manipulative conduct manifesting this condition, the Petitioner was eventually placed in the position of having to distance herself from B.H. Dr. Olson testified that persons with Borderline Personality Disorder are often deceptive and manipulative, and lack credibility. (See Tr. 5/25/06, at p. 209, l. 12 to p. 211, l. 22.) Indeed, B.H. repeatedly telephoned the Petitioner after the Petitioner had moved away from Montana and had attempted to terminate the professional relationship between the parties. Any charges mistakenly billed for the occasion on which B.H. picked up the Petitioner at the airport on October 15, 2002, when B.H. was not the Petitioner's client, were nullified by the Petitioner with B.H.'s knowledge and approval. (Screening Panel Exhibit 1(5)(L), p. 9.)

Clement contested all charges filed by the Board. A contested-case hearing was conducted on May 25-26, 2006, and August 17-18, 2006, with the Department putting on its case, and Clement being allowed to cross-examine some of the witnesses. The Board narrowed the charges into billing fraud,

retaliation/interference with discipline process, dual relationships (boundary violations), breach of confidentiality, and misleading advertising. Clement filed her closing arguments, and the Board responded on October 13, 2006. Following the hearing, on December 8, 2006 the Hearing Examiner issued Proposed Findings of Fact, Conclusions of Law, and Recommended Order.¹ The Hearing Examiner recommended revocation of the Petitioner's license.

Clement filed exceptions and objections, and requested oral argument before the Adjudication Panel of the Board. In her oral arguments, the Petitioner questioned the standard of proof and the Hearing Examiner's claim that the Petitioner billed BCBSMT for B.H.'s telephone counseling. (See Proposed Order, #7, p. 10).² Even after a discussion by the Board, which

¹While the Board currently takes the position that the Petitioner also improperly charged BCBSMT for a computer video camera which would have allowed her to continue face-to-face counseling of B.H. and S.H. after the Petitioner moved to Tennessee, this allegation was never specified as a charge against the Petitioner, and was not included in the Hearing Officer's Proposed Findings of Fact and Conclusions of Law. (See Petitioner's Objections to Proposed Findings of Fact and Conclusions of law at pp. 16-17.)

²BCBSMT did not pay for telephone calls under the carry-over days. These charges were re-billed under Telephone Code 99373, in order to charge them to the clients.

included Board-member statements that Clement had properly submitted requests for payment for telephone counseling sessions under a code which BCBSMT would not pay, the Board voted to adopt, verbatim, the Proposed Findings of Fact, Conclusions of Law, and Recommended Order. The Board's final order was entered on March 26, 2007, and was sent to Clement on March 30, 2007. There was no mention of any process by which to appeal the Board's decision. Clement subsequently filed this timely action for judicial review.

ARGUMENT

I. STANDARDS OF REVIEW.

The Montana Administrative Procedure Act ("APA") sets forth the standards of judicial review of a contested case. Section 2-4-704 provides in relevant part:

§ 2-4-704. Standards of review

- (1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
- (2) The court may not substitute its judgment for that of the agency as to the

weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

* * *

Mont. Code Ann. § 2-4-704.

The decision of an administrative agency in a contested case is reviewed to determine whether the findings of fact are clearly erroneous. *E.g., Montana Solid Waste Contractors, Inc. v. Montana Department of Public Service Regulation*, 2007 MT 154, ¶ 16, -- P.3d --, --, 2007 WL 1828950, *3. By contrast, the court reviews the agency's conclusions of law to determine whether the agency correctly interpreted the law. 2007 MT 154, 16; *see also Westmoreland Resources, Inc. v. Montana Department of Revenue*, 263 Mont. 303, 310, 868 P.2d 592, 596 (1994) (upon judicial review, court defers to agency's findings of fact unless they are clearly erroneous, that is, they are not supported by substantial credible evidence; court reviews agency's legal conclusions simply to determine whether they are correct). A finding of fact is clearly erroneous if it is not supported by substantial evidence, or, if it is supported by such evidence, if the agency misapprehended the effect of the evidence. *Montana Solid Waste Contractors, Inc.*, 2007 MT 154, ¶ 17. Even if substantial evidence exists, and the agency has not misapprehended the effect of the evidence, a reviewing court may nevertheless decide that a finding is clearly erroneous if a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. *Id.*

The Petitioner will demonstrate herein that the Board's decision to revoke her counselor's license was in violation of constitutional provisions, was made

upon unlawful procedure, and was affected by other errors of law. Moreover, the Board's decision was based upon findings of fact that were clearly erroneous. For these reasons, the Court must reverse the Board's decision pursuant to Mont. Code Ann. § 2-4-704.

Due to the magnitude of the potential deprivation in such cases, an agency's burden of proof in license-revocation proceedings should be greater than the preponderance-of-the-evidence standard applied in ordinary civil cases. Although no Montana court has squarely addressed the issue of the appropriate burden of proof in license-revocation proceedings, a majority of courts which have faced the question have determined that an agency's burden of proof in matters involving the revocation of a professional license is clear and convincing evidence. See, e.g., *In re Tinklenberg*, 716 N.W.2d 798, 802 (S.D. 2006); *Billings v. Wyoming Board of Outfitters & Professional Guides*, 88 P.3d 455, 462 (Wyo. 2005) (a disciplinary proceeding before a licensing board is an adversary proceeding, where the burden is on the complaining party to present its case in a proper manner, and to state with precision the charges against the licensee; those charges must be established by clear and convincing evidence); *State ex rel. Oklahoma State Board of Examiners of Certified Shorthand Reporters v. Parrish*, 152 P.3d 202, 203 (Okla. 2006) (standard of proof in cases involving suspension or revocation of professional license is clear and convincing evidence); *State ex rel. Oklahoma Board of Medical Licensure & Supervision v. Litchfield*, 103 P.3d 1111, 1115 (Okla. Civ. App. 2004) (allegations in an action involving the revocation of a professional

license must be proven by clear and convincing evidence); *Gray v. Superior Court*, 23 Cal. Rptr. 3d 50, 56 (Cal Ct. App. 2005) (standard of proof to revoke or to suspend a professional health care license is clear and convincing proof to a reasonable certainty, and not a mere preponderance of the evidence); *Nair v. Department of Business & Professional Regulation*, 654 So. 2d 205, 207 (Fla. Dist. Ct. App. 1995) (evidence must be clear and convincing to revoke or to suspend a professional license).

In the present case, given the nature of the deprivation to which the Petitioner may be subjected, i.e., the revocation of her professional counseling license, the Court should apply the clear-and-convincing-evidence standard adopted by a substantial majority of the courts which have considered the issue of an administrative agency's burden of proof in professional-license-revocation proceedings. As discussed below, under this standard, and even under the less rigorous preponderance-of-the-evidence standard, the Board's decision violates the APA, and must be reversed.

II. THE BOARD COMMITTED AN ERROR OF LAW IN DECIDING THAT THE PETITIONER WAS GUILTY OF BILLING FRAUD, BECAUSE THE PETITIONER'S PROVIDER CONTRACT WITH BCBSMT WAS SILENT AS TO THE PAYMENT OF OVERTIME COMPENSATION.

An insurer is obligated to reimburse a health care provider when the provider contract between the insurer and the provider is silent about the costs of the particular treatment, and the insurer's conduct has suggested that the costs were covered. *See Response Oncology, Inc. v. Blue Cross & Blue Shield of Missouri*, 941 S.W.2d 771, 777 (Mo. Ct. App. 1997).

In the present case, even assuming for the sake of argument that the Petitioner was not entitled to carry over her billing for counseling sessions that, due to the emotional state of the patient and the progress of the session, necessarily exceeded the seventy-five minutes allotted by BCB SMT's Code 90808, the Petitioner's carry-over billing does not constitute billing fraud in violation of the Petitioner's professional obligations. Mont. Code Ann. § 37-1-316(4) provides that it is unprofessional conduct for a licensee to sign or to issue a document or statement that the licensee knows to contain a false or misleading statement. Similarly, Mont. Admin. R. 24.219.804(2)(a)(i), part of the Code of Ethics for Licensed Professional Counselors, prohibits a licensee from committing fraud or misrepresenting the services performed. Fraud consists of nine elements: (1) a representation, (2) the falsity of that representation, (3) the materiality of the representation, (4) the speaker's knowledge of the representation's falsity or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the representation's falsity, (7) the hearer's reliance upon the truth of the representation, (8) the hearer's right to rely upon the

representation, and (9) the hearer's consequent and proximate injury or damages caused by his or her reliance upon the representation. *E.g., In re Estate of Kindsfather*, 2005 MT 51, 17, 326 Mont. 192, 196, 108 P.3d 487, 490. Here, Clement was not aware of the falsity, if any, of her billing statements for overtime sessions, because her provider contract with BCBSMT was silent as to payment or prohibition against payment for sessions running longer than the period provided by Code 90808. The Petitioner reasonably believed that she could submit invoices for such payment, in light of the absence of any provision addressing such compensation in her provider contract with BCBSMT. In fact, the record demonstrates that Clement was unfamiliar with insurance billing given her relative inexperience in the field of counseling at the time of the occurrences at issue. (See Tr. 5/25/06, at p. 69, H. 9-10; Tr. 8/17/06, at p. 148, 11. 5-6; p. 93, 11. 10-15.) If she was *incorrect* about her contractual right to such payment, she did not commit *fraud* in submitting bills for overtime sessions.

It has been held that a claim for overtime pay under a contract is permissible, when the contract is silent regarding such pay. See *Spears v. Miller*, 2006 WL 2808145, *3 (Mass. App. Ct. 2006). Silence in a contract creates an ambiguity when such silence involves a matter naturally within the scope of the contract. See *Public Service Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo 2006). If the language of a contract is silent as to an essential matter, extrinsic evidence may be introduced on the issue. See *Cleary v. News Corp.*, 30 F.3d 1255, 1263 (9th Cir. 1994); *Thompson v. United States Department*

of Labor, 885 F.2d 551, 556 (9th Cir. 1989). Moreover, when a contract is silent or ambiguous as to a particular term, a court may supply a reasonable term to effectuate the parties' agreement, if the other terms of the contract are clear and definite. *In re Marriage of Eilers*, 205 S.W.3d 637, 645 (Tex. Ct. App. 2006) (review denied).

In the case at bar, Clement's provider contract with BCBSMT was ambiguous as to compensation for overtime sessions, in that the contract failed to address this question. This question constituted an essential matter, the payment of compensation for services provided to an insured. Hence, extrinsic evidence was admissible to resolve this ambiguity. The record contains substantial evidence that licensed Montana providers customarily engage in carry-over billing to cover time which is not compensable within a single session or treatment. Even assuming that the Petitioner's legal position was incorrect, and that she was not entitled to overtime compensation under her provider contract, the issue in these proceedings is not whether the Petitioner misunderstood her contractual rights, but whether she committed billing fraud. Because the provider contract was ambiguous on this crucial point, and in light of the evidence before the Board that, in fact, Montana providers do employ carry-over billing, Clement was unaware of the falsity of her billing statements, and, accordingly, cannot be found guilty of fraud under Montana law. In fact, it would have been unethical for the Petitioner to abandon B.H. and S.H. when the clients were in need of the Petitioner's counseling services, on the basis that the Petitioner believed she was not going to be

compensated for her time. (*See* Tr. 8/17/06, at p. 188, 11. 15-18.) For these reasons, the Board committed an error of law in concluding that the Petitioner was guilty of billing fraud, and its decision must be reversed.

III. THE BOARD'S DECISION THAT THE PETITIONER WAS GUILTY OF BILLING FRAUD WAS BASED UPON CLEARLY ERRONEOUS FINDINGS THAT THE PETITIONER BILLED FOR SERVICES ON DATES SHE PROVIDED NONE, IN THAT THE RECORD ESTABLISHES THAT THE PETITIONER PROVIDED COUNSELING SERVICES ON THE DATES IN QUESTION UNDER CIRCUMSTANCES IN WHICH THEY WERE NEEDED BY THE CLIENT.

As discussed above, the record contains ample evidence that Clement, in fact, provided professional counseling services to B.H. when and where such services were needed by the client, and did not limit her services to an office setting. There was expert testimony that this was appropriate, and, indeed, was required in light of a professional counselor's obligation to furnish services at locations and under circumstances in which they are needed by the client. (*See* Tr. 5/26/06, at pp. 211-213.) The Board's adoption of the Hearing Officer's findings that Clement's non-office activities with B.H. did not constitute counseling is not supported by substantial evidence. First, the findings did not even consider the possibility

that such activities could have constituted legitimate counseling, a position completely at odds with the evidence of record. (See Proposed Findings of Fact, Conclusions of Law, and Recommended Order, ¶ 8 at p.3-4; Tr. 5/26/06, at pp. 211-213.) Second, the findings completely overlook the fact that Clement and B.H. had nothing in common socially, that B.H. was a *client* of Clement's and not a *friend*, and that Clement was ethically obligated to furnish necessary services to the at-risk, and previously suicidal, client under circumstances in which B.H. required them. (See Proposed Findings of Fact, Conclusions of Law, and Recommended Order, ¶ 8 at p.3-4.) For these reasons, the Board's decision that the Petitioner billed for services she had not rendered was based upon clearly erroneous findings of fact, and must be reversed.

IV. THE BOARD'S DECISION WAS IN VIOLATION OF CONSTITUTIONAL PROVISIONS, AND WAS MADE UPON UNLAWFUL PROCEDURE, BECAUSE THE PETITIONER WAS DENIED AN OPPORTUNITY TO REVIEW THE MATERIALS SUBMITTED TO THE SCREENING PANEL, AND THE BOARD INTRODUCED ISSUES THAT WERE NOT RAISED AT THE HEARING ON THE CHARGES.

The requirements for procedural due process are: (1) notice and (2) an opportunity for a hearing appropriate to the nature of the case. *E.g., Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶

30, 334 Mont. 237, 247, 146 P.3d 759, 767; see *Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 65, 314 Mont. 121, 137, 63 P.3d 1129, 1140 (due process requires both notice of a proposed action, and the opportunity to be heard). The procedural due process which is required in any given case varies according to the circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision. *Montanans for Justice*, 2006 MT 277, ¶ 30. The right to due process requires sufficient advance notice of the evidence which will be presented at a hearing. *Id.*, ¶¶ 32, 33.

Here, the Petitioner was denied her due-process rights of notice and an opportunity to be heard, when the Board permitted BCBSMT to submit voluminous materials regarding the Petitioner without providing the Petitioner an opportunity to review the materials in order to develop her defenses. The Montana Supreme Court has held that a party to screening-panel proceedings possesses a constitutional right to use evidence presented to the screening panel in subsequent proceedings. See *Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981). A screening panel's findings constitute an item of evidence in later proceedings. See *Barrett v. Baird*, 908 P.2d 689 (Nev. 1995).

In the case at bar, the Screening Panel's findings constituted evidence in the hearings before the Hearing Examiner and the Board, as well as on this action for judicial review. However, the Petitioner was deprived of notice and an opportunity to review the materials submitted to the Screening Panel by

BCBSMT. As discussed above, the Petitioner had a constitutional right to use the evidence presented to the Screening Panel in subsequent proceedings in this case, a right which she was denied because she was not permitted to review the evidence submitted to the Screening Panel, or to use such evidence to develop her defenses. The Screening Panel's findings, when made, became evidence, but they were evidence from the development of which the Petitioner was wrongfully excluded. The Board's argument that the Petitioner was not denied due process because she suffered no deprivation until entry of the final order overlooks the principle, articulated in *Linder*, that evidence presented to a screening panel is an important part of the licensee's subsequent case in defense to the charges. The fact that Clement may have had time to view the materials before the entry of the final order does not remedy the fact that she was denied the opportunity to discern the manner in which the evidence was characterized when presented to the Screening Panel, knowledge which would have proved eminently important in the preparation of the Petitioner's defense. For these reasons, the Board's decision was made in violation of the Petitioner's constitutional right to due process, and upon unlawful procedure. Accordingly, the Board's decision must be reversed. See Mont. Code Ann. § 2-4-704(2)(a)(i), (iii).

In addition, the Board's decision violated the Petitioner's constitutional right to procedural due process because the Board raised issues which were not addressed in the proceedings before the Hearing Examiner. For instance, the Board cited the Licensed Professional Counselors Code of Ethics in asserting

that the Petitioner violated her ethical obligations by using the Homebuilder Model, even though the Board had approved the use of similar models previously. (See Transcript of Proceedings, Full Board Meeting, dated March 2, 2007, at p. 21; Proposed Findings of Fact and Conclusions of Law, at pp. 8, 11-12.) Moreover, nowhere in the proceedings before the Screening Panel, the Hearing Examiner, or the Board was the dual relationship³ allegedly created by the use of the Homebuilder Model identified. Dual relationships are not prohibited per se. In fact, the Board has approved their use when they are proved to be therapeutic and are conducted under supervision. The Petitioner was being supervised in her treatment of B.H. and S.H. by Dr. Roger Dale Barnes. (See Tr. 8/17/06, at p. 113, 11. 16-22.)

In addition, the Board found that the Petitioner's website, administered from her office in

³Although the Board argued, at the October 30, 2007 hearing in this case, that "there's plenty of references to dual relationships" (see Transcript of Hearing, October 20, 2007, at p. 22, 11. 6-15), in fact an examination of the record reveals that nowhere did the Board identify what type of dual relationship, if any, was created by the Petitioner's use of the Homebuilder Model. This fact is crucial, given that the very foundation of the Board's dual-relationship allegation was based upon the use of that specific therapeutic model. For this reason, the Petitioner was actually deprived of notice as to the charge which she was being required to defend.

Tennessee and not designed solely for patients in Montana, violated the ethical prohibition against false advertising by stating that swimming with dolphins is therapeutic. However, the record demonstrates that Clement never offered dolphin swims as a counseling technique. Moreover, the Petitioner's web site did not claim that swimming with dolphins is a therapeutic counseling technique. (See Board's Exhibit 5(C).) In addition, the Board's and the Hearing Examiner's conclusions are based upon the erroneous assumption that the Petitioner's Montana counseling license controlled the Petitioner's entire website. In fact, the process for promulgation of the rule upon which the Board relies for its false-advertising charge was not commenced until August 2003, after the events at issue had occurred. All of these acts by the Board and the Hearing Examiner violated the Petitioner's constitutional right to procedural due process because the Petitioner was not provided with notice as to the matters being considered, or as to the standards which the Petitioner allegedly violated.

A party's due-process rights are satisfied when he or she receives notice of the alleged violation, the evidence against the party is disclosed, and the party is afforded the opportunity to present evidence and to cross-examine witnesses. *See State v. Kingery*, 239 Mont. 160, 165, 779 P.2d 495, 498 (1989). Indeed, the APA mandates that, in a contested case, a party be given notice which includes a plain statement of the matters asserted. *See* Mont. Code Ann. § 2-4-601(2)(d). The Petitioner was charged with violating the requirements of Mont. Code Ann. § 37-1-316(4), (9), (15), and (18). These provisions state:

§ 37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

* * *

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

* * *

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

* * *

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a

disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

* * *

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

Mont. Code Ann. § 37-1-316.

The Petitioner was also charged with violating the following provisions of the Montana Administrative Code:

**24.219.804. CODE OF ETHICS -
LICENSED PROFESSIONAL
COUNSELORS**

* * *

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

* * *

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

* * *

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

* * *

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information;

* * *

Mt. Admin. R. 24-219.804.

In the present case, the Petitioner was not provided with notice as to the identity of the dual relationship allegedly created by her use of the Homebuilder Model, in which she had been professionally trained (see tr. 5/25/06, at p. 63, 11. 5-13), or as to which of the foregoing standards prohibited her use of that model. In other words, the cited provisions provided the Petitioner with no notice of the standard to which her conduct was required to conform. The Board impermissibly reversed the burden of proof, such that, through its failure to identify the allegedly improper dual relationship, the Board required the Petitioner to disprove the allegation that her methods were impermissible and ineffective. The Board itself offered no other proof either that the Homebuilder Model created a prohibited dual relationship, or that the Homebuilder Model is ineffective. In this regard, it is highly significant that the Board did not proffer an expert witness who could speak to the alleged deficiencies of, or any advantages of, the Homebuilder Model. There are three national groups that have set forth varying standards for counselors: the American Psychological Association, the American Counseling Association, and the National Board of Certified Counselors. Montana has not adopted any of these standards, which provide specific guidance as to appropriate therapeutic techniques. (See Tr. 8/17/06 at p. 105, 11. 4-19.) In fact, the record establishes that Homebuilder Model is used by numerous Montana counselors. (See Tr. 5/26/06, at p. 200, 11. 6-14.)

Similarly, the provisions cited by the Department provided the Petitioner with insufficient

notice of how her website, created and administered in Tennessee, constituted false advertising in Montana, in light of the evidence that the Petitioner never offered dolphin swims to Montana residents as a counseling technique. For these reasons, the Petitioner's due-process rights to notice and an opportunity to be heard were violated, and the Board's decision was based upon an unlawful procedure. Consequently, the decision must be reversed.

V. THE BOARD'S DECISION WAS IN VIOLATION OF CONSTITUTIONAL PROVISIONS, BECAUSE THE DEFINITION OF "HARM" TO A PATIENT, FOR PURPOSES OF LICENSE REVOCATION, IS UNCONSTITUTIONALLY VAGUE.

Neither Mont. Code Ann. § 37-1-316 nor Mont. Admin. R. 24-219.804, the provisions under which the Petitioner was charged, defines "harm" for purposes of the revocation of the license of a professional counselor. Moreover, there are no Montana decisions which define the term "harm" for such purposes. Mont. Admin. R. 24.219.2305(1)(b), which sets forth the elements of unprofessional conduct for professional counselors, provides that intentionally causing "physical or emotional harm to a client" is unprofessional conduct. In its brief, the Department cites Mont. Admin. R. 24.219.2305(1)(b) as defining conduct that does not meet the generally accepted standards of practice for purposes of establishing unprofessional conduct by a professional counselor. However, this rule, and the statute allegedly

incorporating it, contain a constitutionally insufficient standard by which the acts of professional counselors may be judged.

A statute maybe challenged as violative of the right to due process based upon its vagueness on two grounds: (1) that the statute is so vague that it is void on its face, or (2) that the statute is vague as applied in a particular situation. *E.g.*, *State v. Turbiville* , 2003 MT 340, ¶ 18, 318 Mont. 451, 457, 81 P.3d 475, 479. A noncriminal statute is unconstitutionally vague in violation of due process if a person of common intelligence must guess at its meaning. *Wing v. State ex rel. Department of Transportation*, 2007 MT 72, ¶ 12, 336 Mont. 423, 426, 155 P.3d 1224, 1226.

In the case at bar, the statute and rule upon which the Board has relied in revoking the Petitioner's license for causing "harm" to B.H. and S.H. are unconstitutionally vague, because they purport to allow the revocation of the Petitioner's license upon evidence which clearly indicates that the Petitioner did no harm to her clients. Hence, the Petitioner was placed into the position at having to guess at the meaning of these provisions. Specifically, the record indicates that Dr. Olson, who saw B.H. following her counseling by the Petitioner, did no new scientific testing or outside evaluation relative to B.H.'s assertion that she "no longer trusted counselors." (See Tr. 5/25/06, at p. 89, 1. 16; p. 190, 11. 18-19.) B.H.'s lack of trust in counselors is not the result of her counseling with Clement. Rather, it is a characteristic of Borderline Personality Disorders, as documented by the following:

1. The Minnesota Multiphasic Personality Inventory-2, performed in the office of Dr. Olsen on October 29, 1999, reported that persons with B.H.'s condition "have difficulty establishing a treatment relationship because they mistrust other people. The client is so emotionally and socially alienated that it would be difficult for a therapist to gain her confidence." (Petitioner's Exhibit D, p.5, 11.13-15.)
2. The Dismissal Summary from Dr. Olson's commitment of B.H. to Deaconess Billing Clinic for noncompliance with medication orders and out-of-control behavior, probably leading to a manic episode with suicidal ideation on May 11, 2000. In his history of B.H.'s present illness, Dr. Wall reported: "On my interview with her she is quite short and essentially refuses to communicate. The patient denies any active suicidal ideation at present, however, there is ample documentation that this has been an ongoing problem of hers from Dr. Olson" and "there is also a strong odor of alcohol on the patient although she adamantly

denies any drinking" (page 3 under mental status evaluation, lines 6-10) (Clement's Exhibit 1 (6), p. 57-65).

3. Testimony of Dr. Hillegass, who saw B.H. in regular, consistent psychotherapy from September 2000 until April 2001, in which he stated: "Complaining and threatening to quit therapy and then calling mid-week with emergencies and demanding to be seen . . . continued to demonstrate . . . generally indicative of borderline personality disorder." (Tr. 8/17/06, p.154, 11. 20-21, 1. 25; p. 155, 11. 1-2). (Stopping and then reestablishing counseling is the typical pattern for this type of client and happened on at least three major occasions with Clement as well.)

After treatment by the Petitioner, B .H. has never been hospitalized, has held her job as a cook for the Starwind Ranch for "a little over a year" (Tr. 5/25/06, at p. 88, l. 9), is amicably separated from her husband with whom she had many crises (*id.* p.87, 11. 12-20), and has taken up residency and become an assistant manager in one of the locations recommended by Clement with Isabelle Marlow, who manages a federal housing unit. (*Id.* at p. 87, 11. 21-25; p. 88,1.1)

Hence, the Board concluded that the Petitioner caused harm pursuant to a statute and rule that are so impermissibly vague as to allow a finding of harm, despite the foregoing uncontroverted evidence of record that B.H. palpably improved under the Petitioner's treatment. Because the statute and rule allow such a result, a professional counselor in the position of the Petitioner is reduced to guessing at the meaning of these provisions, and what they proscribe. Accordingly, the Board's decision was made in violation of the Petitioner's due-process rights, and must be reversed.

CONCLUSION

For all the foregoing reasons, the Petitioner, Mary J. Clement, respectfully requests that this Honorable Court grant her Petition for Judicial Review and reverse the decision of the Board revoking the Petitioner's Montana license to practice professional counseling.

Respectfully submitted,

Mary J. Clement
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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing motion and order upon all parties by

depositing a copy of the same in the United States
mail, postage prepaid, addressed as follows:

Don E. Harris, Esquire
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Counsel for Respondents

This the day of December, 2007.

Mary J. Clement

[TR. OF HEARING OCT. 30, 2007 p. 17]

subsequent substantive hearing where its determined whether or not those charges and allegations had any basis in fact, whether or not the statutes and rules apply to the allegations of fact. And so I think that you really have to distinguish the screening panel meeting with the administrative hearing, and it doesn't appear that the petitioner was doing that when she was requesting judicial review.

Due process means that you have to have notice of a proposed action and a meaningful opportunity for a hearing, and *Chris Moore versus Montana Board of Outfitters*, 2005 Mont 109, states that and we've seen it plenty of other times.

The petitioner got both a hearing and a notice of proposed board action. The notice was provided on September 5 of 2004. From that point onward, the petitioner had a and she availed herself of the opportunity for a hearing.

The due process clauses of the Montana and United States constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. Due process required prior to or, in some instances, it's allowed after a government action that deprives a person of rights.

But in this case, the property interest, which is the license that petitioner had, was not in jeopardy at all leading up to the screening panel meeting, was not in jeopardy at the time of the screening panel meeting.

And only when the screening panel found there was
reasonable use to believe that the

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Cause No. DA 08-0077

MARY J. CLEMENT,
Petitioner-Appellant,

vs.

STATE OF MONTANA,
DEPARTMENT OF LABOR AND INDUSTRY,
BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS,
Respondents-Appellees.

APPEAL FROM THE MONTANA FIRST
JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY
Hon. Jeffrey M. Sherlock

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STATEMENT OF THE ISSUES

I.A. The issue is whether Mont. Code Ann. § 37-1-316(18) and Admin. R. Mont. 24.219.804(1)-(2) are unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment when the statute does not specifically delineate proscribed acts and when the rule does not specifically define what constitutes "harm."

I.B. The issue is whether Clement's procedural due process rights were violated when the Board disclosed evidence submitted by BCBSMT only after the Screening Panel met and found reasonable cause.

II. The issue is whether there is substantial evidence that Clement committed billing fraud when the record reflects that Clement billed her clients insurance carrier for counseling at times when Clement's clients did not know they were getting therapy.

III.A. The issue is whether the Notice of Proposed Board Action satisfied procedural due process by making Clement aware of the issues she had to defend when the Notice did not specifically match each alleged fact to a particular violation.

III.B. The issue is whether there is substantial evidence to support the Board's determination that Clement's conduct led to the creation of inappropriate dual relationships contrary to the generally accepted standards of the profession when Clement purchased expensive things for her client and Clement had her client drive her from place to place.

IV. The issue is whether there is substantial evidence that Clement breached her professional duty to protect client confidences in violation of Montana Code Annotated Sections 37-1-316(9) and 37-23-301 and Administrative Rule of Montana 24.219.804(2)(6)(viii) when the client was counseled by Clement at times when others were present.

V. The issue is whether there is substantial evidence that Clement's website was misleading when it referred to both counseling and "alternative therapies" such as swimming with dolphins.

STATEMENT OF FACTS

In her capacity as a licensed clinical professional counselor, Clement met and counseled a husband and wife, respectively S.H. and B.H., on a variety of their personal issues. B.H. and S.H. filed a complaint with the Board on November 4, 2003. Clement was given notice of the complaint and an opportunity to file a written response and to appear at the next meeting of the Screening Panel of the Board of Social Work Examiners and Professional Counselors. At that meeting, the Screening Panel determined that based on all of the evidence before it, including the complaint and Clement's response, there was reasonable cause to believe that she had violated particular statutes and rules justifying disciplinary proceedings. After the Screening Panel determined that there was reasonable cause to believe that the licensee violated Mont. Code Ann. §§ 37-1-316(4), (5), (9), (15), (18), and 37-22-301 and that the licensee violated the following subsections of the Administrative Rules of Montana, 24.219.804(2)(a)(i), (2)(a)(iii), (2)(b)(i), (2)(b)(viii), legal counsel for the Department of Labor and Industry prepared a Notice of Proposed Board Action and Opportunity for Hearing (hereafter "Notice"). The Notice was sent to Clement by certified mail on September 1, 2005. Clement requested a hearing, and Hearing Examiner Gregory L. Hanchett was appointed and held a contested case hearing in this matter on

May 25 and May 26 and August 17 and August 18, 2006. Following the hearing, Hearing Examiner Hanchett issued Proposed Findings of Fact, Conclusions of Law, and a Recommended Order (hereafter 'Proposed Order') on December 8, 2006. Clement filed exceptions and objections and requested oral argument before the Adjudication Panel of the Board. After considering the Hearing Examiner's proposal for decision, Clement's written exceptions, the Department's written response, and the parties' oral arguments in support of their positions, the Adjudication Panel unanimously voted to adopt, verbatim, the proposal for decision as the agency's final order. The Board's Final Order was filed March 26, 2007 and sent to Clement by certified mail on March 30, 2007.

STANDARD OF REVIEW

In *Mont. Solid Waste Contrs. v. Mont. Dept. of Pub. S. Regulation*, 2007 MT 154, ¶¶ 16-17, 338 Mont. 1, 1647, 161 P.3d 837, ¶¶ 16-17, the Court described the standard of appellate review of a district court order on a petition for judicial review. The following excerpt from that opinion succinctly states the task before the Court:

Pursuant to the Montana Administrative Procedure Act (MAPA), a district court reviews an administrative agency's decision in a contested case to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law. The standard of review for an agency decision

is set forth in § 2-4-704(2), MCA, which provides:

The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

A finding is clearly erroneous if it is not supported by substantial evidence; fit is supported by substantial evidence, because the agency misapprehended the effect of the evidence. Moreover, even if substantial evidence exists and the effect of the evidence has not been misapprehended, the court may still decide that a finding is clearly erroneous when "a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." We in turn employ the same standards when reviewing the district court's decision, and must accordingly determine whether an agency's findings of fact are clearly erroneous and whether its conclusions of law were correct.

Id. (citations omitted).

The Court has further adopted a three-part test to determine if an agency's decision is clearly erroneous.

First, the Court will review the record to decide whether the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court must

determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed."

St. Compen. Mut. Ins. Fund v. Lee Rost Logging (1992), 252 Mont. 97, 102, 827 P.2d 85, 88; *Interstate Prod. Credit Ass 'n v. DeSaye* (1991), 820 P.2d 1285. When applying the first part of the test, a finding of fact is binding on the Court if it is "supported by substantial evidence, regardless of whether there is substantial evidence or even a preponderance of evidence to the contrary." *Gypsy Highview Gathering System, Inc. v. Stokes* (1986), 221 Mont. 11, 716 P.2d 620. Substantial evidence must be more than a scintilla, but may be less than a preponderance, of evidence. *In re Marriage of Davies* (1994), 266 Mont. 466, 472, 880 P.2d 1368, 1372; *Miller v. Frasure* (1991), 248 Mont. 132, 137, 809 P.2d 1257, 1261; *Barrett v. ASARCO, Inc.* (1990), 245 Mont. 196, 200, 799 P.2d 1078, 1080.

In reviewing legal questions, the standard of review is abuse of discretion. *City of Billings v. Billings Firefighters* (1982), 200 Mont. 421, 430-431, 651 P.2d 627, 632; *Teamsters Local No. 45 v. State ex Rel., Bd. of Personnel App.* (1986), 223 Mont. 89, 92, 724 P.2d 189, 191; *Montana-Dakota Util. Co. v. Mont. Dept. of*

Pub. Serv. Reg. (1986), 223 Mont. 191, 199, 725 P.2d 548, 553; *Johnson v. Bozeman Sch. Dist. No. 7* (1987), 734 P.2d 209, 211, 211-212.

SUMMARY OF THE ARGUMENT

The statutes and rules governing Licensee's conduct were sufficiently clear to allow a person of ordinary intelligence to comprehend their meaning. Given the "strong presumptive validity of legislative acts" and the limiting instructions proffered by the Board in the form of rules, the statutes and rules did not violate Licensee's substantive due process rights.

Procedural due process rights were also satisfied because the Notice was sufficiently specific to provide Licensee notice of the charges she would need to defend against. The Licensee faced little harm at the Screening Panel stage, and the Screening Panel materials were provided to Licensee quickly following the reasonable cause finding. Thus, the administrative burden of pre-Screening Panel disclosure outweighed the benefits and risks of nondisclosure to the Licensee.

The District Court's findings of fact were not clearly erroneous because, unlike the unsupported contentions made by the Licensee, each finding was supported by substantial evidence.

ARGUMENT

I.A. The statutes and rules pertaining to Clement's conduct are not unconstitutionally vague.

The Board contends the administrative findings, inferences, conclusions, and decisions do not violate constitutional or statutory provisions. On appeal, Clement maintains that the District Court erred in concluding that her due process rights were not violated by the Board's enforcement of statutes that she alleges are unconstitutionally vague. Specifically, Clement takes issue with Montana Code Annotated Section 37-1-316(4), (5), (9), (15), and (18) as well as Rule 24.219.804 of the Administrative Rules of Montana. Although Clement listed several subsections of the unprofessional conduct statute, her argument appeared to focus entirely on Subsection 18. Consequently, the Board's argument focuses on Subsection 18. The Board argues that this statute and rule are sufficiently clear to avoid causing persons of common intelligence to guess at their meaning, and therefore, the statute and rule are not so vague that they violate due process.

"The Fourteenth Amendment to the United States Constitution, and the Montana Constitution at Article II, § 17, provide that no person shall be deprived of life, liberty, or property without due process of law." *Montanans for Justice*, 2006 MT 277, ¶ 29, 334 Mont. 237, ¶ 29, 146 P.3d. 759, ¶ 29. Clement contends her substantive due process rights were violated due to alleged vagueness in the statute and rule. She refers to Hearing Examiner's determination, adopted by the Board, that the "Home Builders Model" was "not a recognized modality of treatment in the licensed clinical professional counseling arena." App.'s Br. at 17; *see also* Proposed Order at 2. In the Proposed Order ultimately adopted

by the Board, the Hearing Examiner found that Clement's use of the "Home Builder" method denigrated long accepted models of professional boundaries by actively promoting dual relationships of a type that are potentially and actually destructive to clients. Proposed Order: Finding of Fact 26(B); *see also* Proposed Order: Findings of Fact 2, 13, 21-25, 26(C). The Hearing Examiner also concluded that the dual relationships that arose as a result of "Home Builder" method did not meet the generally accepted standards of practice in violation of Mont Code Ann. § 37-1-316(18). Proposed Order: Conclusions of Law 9, 15(A).

The Board acknowledges that Mont. Code Ann. § 37-1-316(18) does not present a perfectly precise list of "dos and don'ts" of professional conduct. The Court has held that "noncriminal statutes are unconstitutionally vague if persons of common intelligence must necessarily guess at their meaning." *Broers v. Mont. Dept. of Revenue* (1989), 237 Mont. 367, 371, 773 P.2d 320, 323. Statutes are presumed constitutional, and the party challenging the constitutionality of a legislative enactment bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *T & W Chevrolet v. Darvial* (1982), 196 Mont. 287, 292, 641 P.2d 1368, 1370.

In *Monroe v. State* (1994), 265 Mont. 1, 873 P.2d 230, the Court analyzed a statute in the context of a criminal appeal under the criminal statute standard of review; however, the Court's analysis is instructive.

Statutes are accorded a presumption of constitutionality; the burden of proof is upon the party challenging a statute's constitutionality. Any doubt is to be resolved in favor of the statute.

This Court has set forth the standard for facial vagueness as "a statute . . . is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute."

However, the fact that a statute is difficult to apply to some situations does not render it unconstitutionally vague.

The strong presumptive validity that attaches to [a legislative act] has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

The complainant attacking a statute's validity must prove that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

Monroe, 265 Mont. 1, 3-4, 873 P.2d 230, 231. In evaluating such challenges, courts should "consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates* , 455 U.S. 489, 495 (U.S. 1982).

The Board has offered limiting information in the form of at least three rules. First, Administrative Rule of Montana 24.219.2305(1)(b), which first became effective on April 25, 1986, describes acts of unprofessional conduct. It is unprofessional conduct for a licensee to "perform . . . services beyond . . . her field or fields of competence as established by . . . her education, training and/or experience." Admin. R. Mont. 24.219.2305(1)(f). This rule was in place prior to 1997 and before Clement became licensed in Montana. It applies to all of her conduct. Second, Administrative Rule of Montana 24.219.2305(1)(b) provides that "intentionally causing] physical or emotional harm to a client" is unprofessional conduct. That rule was also promulgated before 1997, and it, too, applied to all of Clement's acts as a licensee. Finally, Administrative Rule of Montana 24.219.804, which first became effective on October 17, 2003, describes a code of ethics for licensed professional counselors. This rule was in place for all of Clement's conduct that occurred after the effective date, including among other things, Clement's retaliatory letter to the Social Security Administration (Proposed Order: Finding of Fact 17; Department's Exhibit 1(2)(M).), her effort to have S.H. and B.H. sign a declaration she created that contained a number of falsehoods (Proposed Order: Finding of Fact 18; Department's Exhibit 1(4).), her misleading

website (Proposed Order: Finding of Fact 9; Department's Exhibit 1(5)(C).), and her continuing misrepresentations to BCB SMT (Department's Exhibit 1(5)(E).) Between the three rules, it should have been clear to a person of ordinary intelligence that the conduct Clement engaged in would be and was forbidden by statute.

In *Broers v. Mont. Dept. of Revenue* (1989), 237 Mont. 367, 773 P.2d 320, the Court considered the Department of Revenue's administrative decision to deny the renewal of a liquor license. In its analysis of a statute which required license denial where "the applicant's past record and present status as a purveyor of alcoholic beverages and as a businessman and citizen [did not] demonstrate that he is likely to operate his establishment in compliance with all applicable laws of the state and local governments," *id.* at 370, the Court stated, "It is the duty of the courts to uphold the constitutionality of a statute if such can be accomplished by a reasonable instruction." The Court approved of the analysis of the District Court of Appeals of Florida, which upheld Florida's statute limiting licensure to "persons of good moral character." *Id.* at 371. That Court held, "We doubt that the legislature could in its infinite wisdom detail each salient standard for good moral character. What constitutes good moral character is a matter to be developed by facts, evaluated by the agency, with a judicial review of same ever available. The subject statute is constitutional." *Zernour, Inc. v. State Division of Beverage* (Fla. App. 1977), 347 So.2d 1102, 1103, citing *White v. Beary* (Fla. App. 1970), 237 So.2d 263, 265-66. The Montana Supreme Court upheld the

statute and affirmed the Department of Revenue's denial of the liquor license renewal.

Appellant's argument is similar in this case. She contends that use of the word "harm" in Administrative Rule of Montana 24.219.2305(1)(b) rendered the rule and the statute it interprets, Montana Code Annotated Section 37-1-316(18), unconstitutionally vague. The Department maintains that neither the statute nor the administrative rules standing alone are vague when reviewed within the framework of the *Broers* or *Monroe* analysis. The statute instructs licensees that they must conform their conduct to the generally accepted standards of the practice of professional counseling. Multiple witnesses described Clement's conduct as below the level that is expected of licensed clinical professional counselors. See, e.g., Admin. Hrg. Transcr. 185:16-22 (May 25, 2006) (Dr. Olson testified that Clement's treatment method was substandard.); Admin. Hrg. Transcr. 254-268 (May 25, 2006) (Dr. O'Malley testified that Clement's conduct violated the standards of conduct for professional counselors.). The testimony does not indicate that whether Clement violated professional standards was a close question. The fact that § 37-1-316(18) did not delineate every standard of the profession of professional counseling did not prevent Dr. Olson and Dr. O'Malley from knowing that the standards of the profession were violated in the instant case by specific actions taken by the licensee.

Clement incorrectly paraphrases the Court's holding in *Mont. S. Ct. Commn. Unauthorized Prac. L. v. O'Neil*, 2006 MT 284, ¶ 81, 334 Mont. 311, ¶ 81, 147

P. 3d 200, ¶ 81. Clement believes the case stands for the proposition that "[i]n order to avoid being unconstitutionally vague, a statute governing professional conduct must define the acts which are forbidden." Appellant's Br. at 17. Actually, that particular paragraph in *O'Neil* includes only a recitation of O'Neil's argument and the Court's long-established benchmark for reviewing allegedly vague statutes. *O'Neil* at 81. In fact, *O'Neil* supports the Board's argument that statutes that proscribe conduct by reference to general standards are not inherently vague. In *O'Neil*, the Court determined that Sections 37-67-201 and -210, MCA, provided citizens fair notice of conduct that was prohibited as unauthorized practice of law. *Id.* at 82. The statutes made it contempt of court to "perform such acts . . . as are usually done or performed by an attorney at law in the practice of his profession." Mont. Code Ann. §§ 37-67-201 and -210. Although imprecise, the Court found that the statute and its reference to "usual practice" provided fair notice of prohibited conduct. *O'Neil* at 182.

Despite Clement's argument to the contrary, use of the word "harm" in Administrative Rule of Montana 24.219.2301(1)(b) likewise did not make the rule or the statute unconstitutionally vague. Administrative Rule of Montana 24.219.2305(1)(b) prohibits "intentionally causing] physical or emotional harm to a client." Clement contends that, as applied to the facts of this case, the administrative rule is vague because it permitted the Board to determine that Clement had harmed her client, B.H., even though certain aspects of B.H.'s life may have improved after Clement's

treatment. Appellant's Br. at 20-21. The Board responds that the meaning of "harm" is clear to both members of the public and licensees, and furthermore, "harm" does not require diminution of quality of life.

The Court will typically "apply the same principles in construing administrative rules as [the Court does] in construing statutes. *Glendive Med. Ctr., Inc. v. DPHHS*, 2002 MT 131, P15, 310 Mont. 156, P15, 49 P.3d 560, P15. "The Legislature is not required to define every term it employs when constructing a statute. If a term is one of common usage, readily understood, it will be presumed that a reasonable person of average intelligence comprehends it. *State v. Martel* (1995), 273 Mont. 143, 150, 902 P.2d 14, 18-19. According to the Random House Unabridged Dictionary (Random House, Inc. 2006), harm means: 1. physical injury or mental damage; hurt; 2. moral injury; evil; wrong. When viewed in the context of the administrative rule, this meaning appears to be precisely what the Board was aiming for when it promulgated the regulation. "[A]n 'agency's interpretation of its rule is afforded great weight,' [and] courts should 'defer to that interpretation unless it is plainly inconsistent with the spirit of the rule' and the interpretation will be upheld 'so long as it lies within the range of reasonable interpretation permitted by the wording.'" *Juro's United Drug v. Mont. Dep't of Pub. Health & Human Servs.*, 2004 MT 117, ¶ 12, 321 Mont. 167, ¶ 12, 90 P.3d 388, ¶ 12 (citations omitted).

Further, it is notable that neither the rule itself nor the common meaning of "harm" contemplate

complete and catastrophic injury. Clement's reasoning that B.H. was not harmed because, for example, she was able to hold down a job following therapy is unpersuasive. Indeed, many an individual has been harmed and gone on to lead a productive life or even achieve overall improvement in life after the injury. A worker who learns a new and better-paying trade after suffering physical injury that prevents her from doing the work she had done previously has nonetheless been harmed. Rule 24219.2301(1)(b) is breached by any instance of physical, emotional, or mental injury caused by a licensee. There is substantial evidence that Clement harmed B.H. See Order on Petition for Judicial Review 13 (Jan. 11, 2008); Hrg. Examr.'s Prop. Findings of Fact 21-25 (Dec. 8, 2006); Admin. Hrg. Transcr. 189-190 (May 25, 2006).

I.B. Clement's procedural due process rights were not violated when the Board provided evidence it had collected after the Screening Panel meeting rather than before.

Clement contends that the Board should have provided the evidence in its possession prior to the Screening Panel meeting. She contends that under *State v. Kingery* (1989), 239 Mont. 160, 779 P.2d 495, due process requires notice of the alleged violation, disclosure of evidence against the person, and an opportunity for a hearing. The Board agrees that disclosure of evidence against the person is required as well as notice of the violation and an opportunity for a hearing. The Board disagrees that disclosure was required at the Screening Panel stage.

"[T]he requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case." *Montanans for Justice*, 2006 MT 277, ¶ 30, 334 Mont. 237, ¶ 30, 146 P.3d. 759, ¶ 30. "[T]he process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." *Id.* "[D]ue process requirements of notice and a meaningful hearing are 'flexible' and are adapted by the courts to meet the procedural protections demanded by the specific situation." *Id.*

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1975).

In the instant case, Clement faced no real risk of deprivation of her license at the time her case was reviewed by the Screening Panel. The Screening

Panel's function was to determine whether there was reasonable cause to initiate disciplinary action against Clement's license. The initiation of such action by itself had no effect on Clement's ability to practice as a licensed professional counselor. There was likewise no risk that Clement would be erroneously deprived of her property interest at the Screening Panel stage.

After the Screening Panel found reasonable cause to proceed with a disciplinary action against Clement's license, she was informed in the Notice that one of the bases for possible board action was her practice of allegedly filing fraudulent claims with BCBSMT. Notice at 2. and references to the insurance carrier's concerns about Clement are present throughout the first five pages of the pleading. Notice at 2-5. Furthermore, all of the materials considered by the Screening Panel in the process of making a reasonable cause determination were provided to Clement on November 7, 2005. Letter from Lorraine Schneider, Legal Counsel, Montana Department of Labor & Industry, to Mary Clement, Investigation Materials 1 (Nov. 7, 2007). Clement was given the materials again on April 28, 2006 when counsel for the Department of Labor and Industry provided the exhibits she expected to introduce at hearing along with the Prehearing Memorandum. Prehearing Memorandum at 9. Moreover, Clement had the opportunity to request the information in discovery as early as September, 2005, when the Notice was served, and she had until April 21, 2006 to complete discovery. Order Resetting Pre-hearing Deadlines and Continuing Hearing (Feb. 9, 2006). Clement has had every opportunity to discover information relevant to

the case against her. The Board provided her with everything she asked for and was entitled to.

With the Screening Panel's ability to restrict Clement's practice so limited and with Clement having access to all of the materials she wanted after the Screening Panel found reasonable cause, the value of a disclosure requirement prior to the Screening Panel meeting would have been negligible. Clement's requirement of prior disclosure would therefore have imposed additional fiscal and administrative burdens on the Board without any real benefit. As this analysis demonstrates and the District Court held, *see* Order on Petition for Judicial Review 10: 8-10, 11: 5 (Jan. 11, 2008), Clement's procedural due process rights were not violated.

IL There is substantial evidence in the record that Clement committed billing fraud, and therefore, the Board's and District Court's findings that she committed billing fraud were not clearly erroneous and their conclusions of law were correct.

For the sake of brevity and clarity, this brief does not delve into the record to extract every instance of billing misconduct. For purposes of this appeal, one instance of billing fraud could be substantial evidence which would support the Board's and District Court's findings. In light of the couple of examples of billing fraud described below, the Court's findings of fact would not be clearly erroneous, and therefore, Appellant's argument must fail.

Clement invited B.H. to come with her to Bimini, an island in the Bahamas, to swim with dolphins, Hrg. Examr.'s Prop. Findings of Fact ¶ 8(F) (Dec. 8, 2006), and paid for all of B.H.'s costs to attend, *id.* Clement then billed Blue Cross/Blue Shield of Montana (BCBSMT) without telling her client, B.H., that she was providing counseling during the trip. *Id.* See also Department Exhibit 1(5)(B) Blue Cross and Blue Shield of Montana Case Summary and Recommendation 2.

On another occasion, Clement had B.H. take her to Pray, Montana so that Clement could pick up a car. Hrg. Examr.'s Prop. Findings of Fact ¶ 8(A). Clement billed BCBSMT for therapy during that trip, and once again, B.H. did not know she was in therapy. *Id.* See also Admin. Hrg. Transcr. 101: 14-23 (May 25, 2006).

Under Montana Code Annotated Section 37-1-316(4), it is unprofessional conduct for a licensee to "sign[] or issu[e] in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement. Under Montana Code Annotated Section 37-1-316(5), it is unprofessional conduct for a licensee to make "a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation. Under Administrative Rule of Montana 24.219.804, a licensed professional counselor shall not "commit fraud or misrepresent services performed. Both of these examples identified in the preceding paragraphs exhibit satisfy each element of these statutes and rules. These examples are but two of

many cited by the Hearing Examiner and the District Court that illustrate that Clement did in fact commit billing fraud.

III.A. The Notice satisfied procedural due process by making Clement aware of the issues she had to defend.

Clement also alleges that "the entire support for the District Court's finding that Clement committed billing fraud was the court's determination that Clement had improperly used the Homebuilder Model, and, therefore had improperly billed for out-of-office counseling." Appellant's Br. at 17. She contends she did not have "notice as to the identity of the improper dual relationship" or "which . . . statutory and regulatory standards prohibited her use of that model." *Id.* at 17-18. This appears to potentially raise procedural due process issues although she follows the above passages with substantive due process concerns. *See id.* at 18. Because the substantive due process issue is dealt with above, the Board now turns to the possible procedural due process issue raised by Clement. While she does not quite say so, she appears to be arguing that she lacked fair notice of the allegations against her. *See id.* at 18; Clement's Br. in Support of Pet. for Jud. Rev. 14, 14 n. 3 (Dec. 21, 2007); Br. Opp. Respt. Mot. S.J. 14 (Jul. 20, 2007).

The Board contends Clement was adequately informed of the charges against her. The Notice of Proposed Board Action and Opportunity for Hearing (Sept. 1, 2005), described the following facts which support the Screening Panel's reasonable cause

determination and which should have been sufficient to inform Clement of the nature of the charges against her. First, the Notice alleged that Clement billed "for time when Licensee was staying in the home of the complainant and his wife, [B.H.], helping them clean house and wash dishes and when Licensee and [B.H.] went shopping. For example, clinical notes reflect Licensee worked on expanding [B.H.'s] horizons and life survival skills introducing her to other places to get mattresses for her bed when she is able to get a job and pay for it." *Id.* at 3:12-17. Also, "Licensee expended her personal funds for various purchases on behalf of [B.H. and S.H.] which Licensee characterized as 'gifts' to them. The purchases, totaling more than \$4,000, included house paint for [B.H.'s and S. H.'s] home; the house painter's charges; payments to other specialists for services allegedly rendered by them to [B.H.]; computed equipment and/or supplies including a port and camera; vitamins and oils; and airfare, hotel room, day trips, food and taxi expenses relating to a trip that [B.H.] took to Bimini with Licensee." *Id.* at 4: 3-9. Finally, the Notice stated: "Kenneth Olson, MD, a psychiatrist, stated during the course of an investigative interview that Licensees treatment of [B.H.] was unconventional and appeared to be self-promoting. He said he saw no reason for 'in-home' counseling (of [B.H.]) and that there were a lot of boundary issues with this arrangement." *Id.* at 6: 5-8. The Notice further disclosed that on the basis of these facts and the others alleged, the Licensee had committed "conduct that does not meet the generally accepted standards of practice" in violation of Montana Code Annotated Section 37-1-316(18). *Id.* at 8.

The Board is at a loss to explain how, in the face of the foregoing proposed findings of fact and conclusions of law, the Licensee could not understand what she was being accused of. Unfortunately, Clement does not elaborate on her unsupported allegation that she "was never provided with notice as to the identity of the improper dual relationship allegedly created by her use of the Homebuilder Model." Appellant's Br. 18. The statute requires a notice to include:

- (a) a statement of the time, place, and nature of the hearing;
- (b) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (c) a reference to the particular sections of the statutes and rules involved;
- (d) a shaft and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished;

(e) a statement that a formal proceeding may be waived pursuant to 2-4-603.

Mont. Code Ann. § 2-4-601(2) (2005). Pleadings are liberally construed to determine whether the charged parties were given fair notice. *Bd. of Trustees of Billings Sch. Dist No. 2 v. State* (1979), 185 Mont. 104, 107-108, 604 P 2d. 778, 780. Fair notice is given if a charged party having read the pleadings should have been aware of the issues which it had to defend. *Id.*

In the instant case, the Notice described numerous instances in which the patient-counselor boundary was blurred as a result of the deliberate acts of the Licensee. The Notice alleges Clement's conduct was directed primarily toward one client in particular, and the client's name was provided to the Licensee. Thus, Clement should have been familiar with both the individual and the situations that the Board contended were involved in the alleged violations of the rules of professional conduct. Furthermore, Clement was provided the text of each statute and rule the Board contended she violated, including Section 37-1-316(18), MCA. Nowhere in the statute or the due process clause is there a requirement that, at the pleading stage of the process, a party must explain which facts trigger which laws such that one corresponds neatly to another. In many cases, additional facts must necessarily be developed through the process of discovery and through other fact gathering techniques between the time that the case is plead and the day of trial. Indeed, were it always possible to match facts and law in the way Clement

would require at the time cases are plead, virtually every case could be resolved on summary judgment.

As best it could nine months before the first hearing, the Department laid out the matters it intended to prove in short and plain statements. If these statements were unclear to the Licensee, the same subsection of the statute that requires this simple description of the matters asserted also allows the individual charged to request a more definite and detailed statement. See Mont. Code Ann. § 2-4-601(2)(d). Indeed, Clement took advantage of a similar opportunity when she made her Motion to Strike and/or For a More Definite Statement (May 1, 2006). She requested clarification with regard to nine different matters; however, nowhere did she ask the Department to identify the relationship upon which she was charged with professional misconduct. *Id.* Clement might have been able to argue that the hearing examiner's denial of her motion prevented her from receiving fair notice of one of these charges against her had she raised one of those issues in her initial appellate brief. See *Pengra v. State*, 2000 MT 291, ¶ 13, 302 Mont. 276, ¶ 13, 14 P.3d 499, ¶ 13 (2000). Instead, however, Clement now challenges that the notice did not adequately describe one of the issues she did not feel needed clarification prior to the hearing.

Because the notice was adequate as written and because Clement failed to take advantage of the Montana Administrative Procedure Act process for requesting clarification of issues that are unclear in a

notice, Clement's procedural due process claim must fail.

III.B. There is substantial evidence to support the Board's determination that Clement's conduct led to the creation of inappropriate dual relationships that violated the standards of the profession.

Clement contends that the District Court clearly erred when it found that she had an improper dual relationship without formally identifying the alleged dual relationship. The issue regarding identity of the alleged dual relationship is dealt with above. Thus, the Board now turns to focus on the propriety, or in this case, impropriety, of the dual relationship between Clement and B.H.

Clement argues that dual relationships can be appropriate and the Homebuilder Model effective in terms of treating clients. Regardless of whether or not this is true, the Hearing Examiner and the District Court specifically found that in this case, dual relationships and use of the Homebuilder Model were inappropriate. *See* Order on Petition for Judicial Review 6; Hrg. Examr.'s Prop. Findings of Fact ¶¶ 21-25. There is substantial evidence that Clement's use of the Homebuilder Model and Clement's conduct which led to dual relationships were improper. *See, e.g.* Admin. Hrg. Transcr. 255-257, 261, 267 (May 25, 2006). There is even substantial evidence that Clement knew that she was in a dual relationship with B.H. *See, e.g.* Admin. Hrg. Transcr. 273: 6-8 (May 25, 2006); Admin. Hrg. Transcr. 81 (Aug. 17-18, 2006).

IV. There is substantial evidence that Clement breached her professional duty to protect client confidences in violation of Montana Code Annotated Sections 37-1-316(9) and 37-23-301 and Administrative Rule of Montana 24.219.304(2)(b)(viii).

The Hearing Examiner and District Court also found that Clement breached obligations of confidentiality to S.H. Section 37-1-316(9), Montana Code Annotated, proscribes "revealing confidential information obtained as a result of a professional relationship without the prior consent of the recipient of services." Montana Code Annotated Section 37-23-301 provides that a licensee may not disclose any information she acquires from clients consulting her in her professional capacity. Administrative Rule of Montana 24.219.804(2)(b)(viii) requires that all licensees shall "safeguard information provided by clients. Except where required by law or a court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information."

In this case, Clement provided counseling to B.H. in the presence of a painter, Robert Telljohn, without first obtaining the written informed consent of B.H. Admin. Hrg. Transcr. 247: 17 (May 25, 2006). Without obtaining permission to divulge the fact that B.H. was in therapy, Clement revealed the fact that B.H. was a client to people who were strangers to B.H. *Id.* at 97: 12-13. As the Hearing Examiner pointed out, Clement is mistaken in her belief that B.H. waived her right of confidentiality by failing to object to the presence of others. Hrg. Examr.'s Prop. Concl. of Law

10 (Dec. 8, 2006). Clement is confusing rules of admission of evidence with her professional duty to her client. *Id.* The former may be inadvertently waived by a client while the latter may not.

V. There is substantial evidence that Clement's website was misleading due to the express and implied connections between Clement's treatment techniques as a professional counselor and the healing dolphin swims she also advocated on the site.

The Board concluded that "Clement violated Admin R. Mont. 24.219.804(2)(a)(ix) by advertising . . . on her web site that 'swimming with the dolphins' was therapeutic. There is no validated treatment modality in licensed clinical professional counseling that substantiates such a claim. This makes Clement's web site misleading." Hrg. Examr.'s Prop. Concl. of Law 11. The Board did not prohibit the swims or advertising of the swims, but rather, penalized Clement for advertising dolphin swims in connection with professional counseling because the Board determined that linking the two was misleading. The link was illegal under Mont. Code Ann. § Admin R. Mont 24.219.804(2)(a)(ix).

The following excerpts from Clement's website reinforce the link. "Trained as a social worker, Dr. Clement has always used a biological, psychological, and sociological approach to healing." Department's Exhibit 1(5)(C) 1 (depicting Mary J. Clement, Eagle Retreats, Content, <http://www.bald-eagle.com/aboutus>).

html (accessed June 29, 2004)). "Author, counselor, and a well-known therapist, Mary J. Clement, Ph.D., will help you understand these mysterious inner experiences. She will lead you in a workshop or help with any flashbacks, memories or past lives that emerge from your deep unconscious." *Id.* at page 2 of 3 (depicting Eagle Retreats, Content, <http://www.bald-eagle.com/pages/5/page5.html> (accessed June 29, 2004)). "In the evenings, sign up for additional healing experiences with other practitioners and Dr. Mary J. Clement, licensed professional counselor and coach, featuring "The Results System™," a powerful form of energy psychology." *Id.* at pg. 1 of 7 (depicting Wild Dolphin Swims, Content, <http://www.bald-eagle.com/pages/3/page3.html> (accessed June 29, 2004)). Clement's website clearly misleads the public to believe that her wild dolphin swims are a form of therapy related to her license as a professional counselor.

CONCLUSION

The Board requests that Licensee's appeal be denied because the statutes and rules governing her conduct were sufficiently clear to allow a person of ordinary intelligence to comprehend their meaning. Therefore, they did not violate Licensee's substantive due process rights. Furthermore, the appeal should be denied because the Notice was sufficiently specific to provide Licensee notice of the charges she would need to defend against and she was provided the materials considered by the Screening Panel were disclosed to her when necessary. Licensee's procedural due process rights were not violated. Finally, the appeal should be

denied because there was substantial evidence that Licensee committed billing fraud, that she entered into an inappropriate dual relationship with her client, that Licensee breached her professional responsibility to maintain client confidences, and that Licensee's website was misleading. Based on the foregoing, the District Court's findings of fact were not clearly erroneous, and the Court's conclusions of law were correct.

Respectfully Submitted

Don E. Harris

Certificate of Compliance

I certify that the foregoing brief is double-spaced with a proportionally-spaced, Times New Roman, 14-point font. The brief contains ____ words.

Don E. Harris

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of __ 2008, I served a true and accurate copy of the foregoing, first class, U.S. mail, postage prepaid, upon the Licensee addressed as follows:

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___ SWEENEY
___ DISTRICT COURT
2007 MAY 30 A 11:23
FILED
BY C Potuzak
DEPUTY

**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY**

MARY J. CLEMENT,	)	Case No. BDV-2007-329
)	
Petitioner,)	
)	
vs.)	
	)	BRIEF IN SUPPORT
STATE OF MONTANA,	)	OF MOTION FOR
DEPARTMENT OF	)	SUMMARY
LABOR AND INDUSTRY	)	JUDGMENT
BOARD OF SOCIAL)	
WORK EXAMINERS)	
AND PROFESSIONAL)	
COUNSELORS)	
)	
Respondents.)	

COME NOW the Respondents, State of Montana, Department of Labor and Industry and the Montana Board of Social Work Examiners and Professional Counselors (hereafter collectively referred to as "Board") and respectfully submit this brief in support of their Motion for Summary Judgment.

STATEMENT OF THE CASE

This case is before the Court on the Mary J. Clement's Petition for Judicial Review of the Decision of the March 26, 2007 Final Order of the Board revoking her license to practice as a Licensed Clinical Professional Counselor. The Board's decision was made pursuant to the contested case provisions of the Montana Administrative Procedure Act following notice of proposed board action, an administrative hearing that lasted several days, a proposed order by the hearing examiner, and the Board's review of the proposed order and the exceptions and objections made by the Licensee, Mary J. Clement (hereafter "Clement"). The Board accepted the hearing examiner's proposed findings of fact, conclusions of law, and order without modification and determined, inter alia, that Clement used an unrecognized and inappropriate treatment method that endangered her clients, fraudulently billed her clients and their insurance carrier, threatened witnesses in an effort to obstruct disciplinary proceedings involving her license, unethically permitted disclosure of client confidences, and violated numerous Board rules pertaining to relationships with and treatment of clients by licensed professional counselors. In requesting review of the Board's actions, Clement contends she was prejudiced

because the Board's decision violated constitutional and statutory provisions, exceeded the Board's statutory authority, was made upon illegal procedure, was affected by other errors of law, was clearly erroneous in light of reliable evidence in the record, and was arbitrary, capricious, and characterized by abuse of discretion.

The Board contends that it is entitled to judgment as a matter of law pursuant to Mont. R. Civ. P. 56 because Clement has utterly failed to set forth any factual basis which would allow the Court to reverse or modify the decision of the Board under Mont. Code Ann. § 2-4-704(2) and there is nothing in the record that indicates that the Board's decision was in violation of constitutional or statutory provisions, in excess of the statutory authority of the board, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence in the record, or arbitrary or capricious or characterized by abuse of discretion.

PROCEDURAL HISTORY

In her capacity as a licensed clinical professional counselor, Clement met and counseled a husband and wife, respectively S.H. and B.H., on a variety of their personal issues. B.H. and S.H. filed a complaint with the Board on November 4, 2003. Clement was given notice of the complaint and given an opportunity to file a written response and to appear at the next meeting of the Screening Panel of the Board of Social Work Examiners and Professional Counselors. At that

meeting, the Screening Panel determined that based on all of the evidence before it, including the complaint and Clement's response, there was reasonable cause to believe that she had violated particular statutes and rules justifying disciplinary proceedings. After the Screening Panel determined that there was reasonable cause to believe that the licensee violated Mont. Code Ann. §§ 37-1-316(4), (5), (9), (15), (18), and 37-22-301 and that the licensee violated the following subsections of the Administrative Rules of Montana, 24.219.804(2)(a)(i), (2)(a)(iii), (2)(b)(i), (2)(b)(viii), legal counsel for the Department of Labor and Industry prepared a Notice of Proposed Board Action and Opportunity for Hearing (hereafter "Notice"). The Notice was sent to Clement by certified mail on September 1, 2005. Clement requested a hearing, and Hearing Examiner Gregory L. Hanchett was appointed and held a contested case hearing in this matter on May 25 and May 26 and August 17 and August 18, 2006. Following the hearing, Hearing Examiner Hanchett issued Proposed Findings of Fact, Conclusions of Law, and a Recommended Order (hereafter "Proposed Order") on December 8, 2006. Clement filed exceptions and objections and requested oral argument before the Adjudication Panel of the Board. After considering the Hearing Examiner's proposal for decision, Clement's written exceptions, the Department's written response, and the parties' oral arguments in support of their positions, the Adjudication unanimously voted to adopt, verbatim, the proposal for decision as the agency's final order. The Board's Final Order was filed March 26, 2007 and sent to Clement by certified mail on March 30, 2007.

STANDARD OF REVIEW

Jurisdiction and procedure of this matter are governed by the Montana Administrative Procedure Act (Mont. Code Ann. § 2-4-101, et. seq.). Montana Code Annotated Section 2-4-702 requires that a petition for judicial review must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in Mont. Code Ann. § 2-4-704(2) upon which the petitioner contends he is entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled. Moreover, the statute provides that a party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

Under Mont. Code Ann. § 2-4-704, the district court's review of the administrative action must be confined to the record. The district, court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm or remand the case but may reverse or modify the decision in only two circumstances. First, a case may be reversed:

if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Mont. Code Ann. § 2-4-704(2)(a). Alternatively, a case may be reversed "if substantial rights of the appellant have been prejudiced because . . . findings of fact, upon issues essential to the decision, were not made although requested. Mont. Code Ann. § 2-4-704(2)(b).

The Montana Supreme Court has affirmed that when reviewing an administrative agency's findings of

fact, courts should defer to the agency's findings unless they are clearly erroneous. *Westmoreland Resources v. Dep't of Revenue* (1994), 263 Mont. 303, 310, 868 P.2d 592, 596. Generally, findings of fact are not clearly erroneous if they are supported by substantial credible evidence. *Id.* at 596.

The Court has further adopted a three-part test to determine if an agency's decision is clearly erroneous.

First, the Court will review the record to decide whether the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court must determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed."

St. Compen. Mut. Ins. Fund v. Lee Rost Logging (1992), 252 Mont. 97, 102,827 P.2d 85, 88; *Interstate Prod. Credit Ass'n. v. DeSaye* (1991), 820 P.2d 1285. When applying the first part of the test, a finding of fact is binding on the Court if it is "supported by substantial evidence, regardless of whether there is substantial

evidence or even a preponderance of evidence to the contrary." *Gypsy Highview Gathering System, Inc. v. Stokes* (1986), 221 Mont. 11, 716 P.2d 620. Substantial evidence must be more than a scintilla, but may be less than a preponderance, of evidence. *In re Marriage of Davies* (1994), 266 Mont. 466, 472, 880 P.2d 1368, 1372; *Miller v. Frasure* (1991), 248 Mont. 132, 137, 809 P.2d 1257, 1261; *Barrett v. ASARCO, Inc.* (1990), 245 Mont. 196, 200, 799 P.2d 1078, 1080.

In reviewing legal questions, the standard of review is abuse of discretion. *City of Billings v. Billings Firefighters* (1982), 200 Mont. 421, 430-431, 651 P.2d 627, 632; *Teamsters Local No. 45 v. State ex Rel., Bd. of Personnel App.* (1986), 223 Mont. 89, 92, 724 P.2d 189, 191; *Montana-Dakota Util. Co. v. Mont. Dept. of Pub. Serv. Reg.* (1986), 223 Mont. 191, 199, 725 P.2d 548, 553; *Johnson v. Bozeman Sch. Dist. No. 7* (1987), 734 P.2d 209, 211, 211-212.

Under Rule 56, Mont. R. Civ. P., upon a motion for summary judgment, a court must render the judgment sought "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, the Supreme Court of Montana has stated that

in a summary judgment proceeding 'the parties are not arguing over what happened or presenting conflicting evidence; they merely need to know

which of them, under the uncontested facts, is entitled to prevail under the applicable law. In such a case, the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses.

Wurl v. Poison Soh. Dist. No. 23, 2006 MT 8, ¶ 11, 330 Mont. 282, ¶ 11, 127 P.3d 436, ¶ 11. The court "must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case." *Cole v. Valley Ice Garden, L.L.C.*, 2005 MT 115, ¶ 4, 327 Mont. 99, ¶ 4, 113 P.3d275, ¶ 4.

ARGUMENT

The Board contends the claims made by Clement are not supported by the record, and therefore, there is no genuine issue of material fact as to whether Clement's substantial rights were prejudiced as a result of a violation of constitutional or statutory provisions, a decision, conclusion, or finding made in excess of statutory authority, an unlawful procedure, an error of law, a determination that is clearly erroneous in view of the record, or a failure to make findings of fact that were requested upon issues essential to the decision.

A. The administrative findings, inferences, conclusions, and decisions do not violate constitutional or statutory provisions.

Under Mont. Code Ann. § 2-4-704(2)(a)(i), the Board's decision can be reversed if Clement's rights

were prejudiced because the Board's findings, inferences, conclusions, or decisions violated constitutional or statutory provisions. Clement alleges the Board violated her due process rights, rights to freedom of expression and religion, and right against involuntary servitude. According to Clement, the Board first violated her due process rights by allowing Blue Cross Blue Shield of Montana (hereafter "BCBSMT") to submit materials directly to the Board "without filing a complaint against Petitioner."

"The Fourteenth Amendment to the United States Constitution, and the Montana Constitution at Article 11, § 17, provide that no person shall be deprived of life, liberty, or property without due process of law. The guarantee of due process has both a procedural and a substantive component." *Montanans for Justice*, 2006 MT 277, ¶ 29, 334 Mont. 237, ¶ 29, 146 P.3d. 759, ¶ 29. Although it is not entirely clear from her Petition, it appears that Clement contends that the Board's acceptance of the billing materials submitted by BCBSMT violated procedural due process. "[T]he requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case." *Id.* at 30. "[T]he process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." *Id.* "[D]ue process requirements of notice and a meaningful hearing are 'flexible' and are adapted by the courts to meet the procedural protections demanded by the specific situation." *Id.*

In the instant case, Clement was informed in the Notice that one of the bases for possible board action was her practice of allegedly filing fraudulent claims with BCBSMT (**Notice at 2.**) and references to the insurance carrier's concerns about Clement are present throughout the first five pages of the pleading (**Notice at 2-5.**). Furthermore, all of the materials considered by the Screening Panel in the process of making a reasonable cause determination were provided to Clement on November 7, 2005. (**Letter from Lorraine Schneider, Legal Counsel, Montana Department of Labor & Industry, to Mary Clement, *Investigation Materials 1* (Nov. 7, 2007).**) Clement was given the materials again on April 28, 2006 when counsel for the Department of Labor and Industry provided the exhibits she expected to introduce at hearing along with the Prehearing Memorandum. (**Prehearing Memorandum at 9.**) Moreover, Clement had the opportunity to request the information in discovery as early as September, 2005, when the Notice was served, and she had until April 21, 2006 to complete discovery. (**Order Resetting Pre-hearing Deadlines and Continuing Hearing (Feb. 9, 2006).**)

Clement has had every opportunity to discover information relevant to the case against her. The Board provided her with everything she asked for and was entitled to. Nonetheless, Clement claims her due process rights were violated because she was not provided the BCBSMT materials prior to the Screening Panel's hearing to determine whether there was reasonable cause to believe that a violation of the licensing laws had occurred. At that stage, however,

the Board had not taken any action against her. At that stage, it did not matter who submitted the complaint. See Mont. Code Mn. § 37-1-308(1) ("[A] person, government, or private entity may submit a written complaint to the department charging a licensee . . . with a violation of this part and specifying the grounds for the complaint."). As soon as the Screening Panel determined that there was reasonable cause to believe that a violation had occurred and proposed to take action against Clement's license, Clement was given notice of the proposed action and the reasons therefor and an opportunity to contest the proposed action at a hearing. Clement's charge that her due process rights were violated because the Screening Panel reviewed information submitted by BCBSMT in addition to the complaint by S.H. is not supported by fact or law.

Clement next alleged that the Board violated her right of due process when it "held Petitioner to a standard that had not been heretofore adopted in Montana." (**Petition at 9.**) She argues that the Board had not adopted any specific ethical standards and was consequently limited only to the standards that were specifically stated in statute or rule. She further alleged that "the Board's rules were not promulgated until after August 21, 2003 and much of the Board's complaint stems from counseling done prior to the rules promulgation." (**Petition at 10.**) Unfortunately, Clement did not identify the rules that were allegedly applied to her in violation of her due process rights. This has placed the Board in the untenable position of having to defend rules it cannot identify. This situation is analogous to a case on appeal in which the appellant

fails to cite relevant authority or the record. In such cases, the Supreme Court has declined to consider the unsupported arguments. *In re Custody of Krause*, 2001 MT 37 ¶ 32, 304 Mont. 202, ¶ 32, 19 P.3d 811, ¶ 32; *In re Marriage of Hodge*, 2003 MT 146, ¶ 10, 316 Mont. 194, ¶ 10, 69 P.3d 1192, ¶ 10; *State v. Clifford*, 2005 MT 219, ¶ 34, 328 Mont. 300, ¶ 34, 121 P.3d 489, ¶ 34. This is true even in the case of pro se litigants. See, e.g., *First Bank WA) - Billings v. Heidema* (1986), 219 Mont. 373, 376, 711 P.2d 1384, 1386. It should certainly be true in Clement's case, because as the holder of a juris doctorate and a license to practice law in Tennessee, see **Department's Exhibit 1(5)(C)** (depicting Mary J. Clement, Bold-Eagle, About : Us, <http://www.bold-eagle.com/aboutus.html> (accessed June 29, 2004)), Clement should be aware of the requirement to cite to authority. "[I]t is not th[e] Court's obligation to guess what a party's position is or conduct legal research that may lend support to his position." *Ray v. Mont. Tech of the Univ. of Mont.*, 2007 MT 21, ¶ 59. The Baud contends Clement's unsupported claims of due process violations should be dismissed.

In the context of her substantive due process complaint, Clement does make specific reference to the determination that the "Home Builders Model" was "not a recognized modality of treatment in the licensed clinical professional counseling arena." (**Petition at 9; see also Proposed-Order at 2.**) In the Proposed Order ultimately adopted by the Board, the Hearing Examiner found that Clement's use of the "Home Builder" method denigrated long accepted models of professional boundaries by actively promoting dual

relationships of a type that are potentially and actually destructive to clients (**Proposed Order: Finding of Fact 26(B)** ; *see also Proposed Order: Findings of Fact 2, 13, 21-25, 26(C).*) and concluded that the dual relationships that arose as a result of "Home Builder" method did not meet the generally accepted standards of practice in violation of Mont. Code Ann. § 37-1-316(18) (**Proposed Order: Conclusions of Law 9, 15(A).**).

The Board acknowledges that Mont. Code Ann. § 37-1-316(18) does not present a completely precise list of "dos and don'ts" of professional conduct. However, the Supreme Court of Montana has stated:

Statutes are accorded a presumption of constitutionality; the burden of proof is upon the party challenging a statute's constitutionality. Any doubt is to be resolved in favor of the statute.

This Court has set forth the standard for facial vagueness as "a statute . . . is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute."

However, the fact that a statute is difficult to apply to some situations does not render it unconstitutionally vague.

The strong presumptive validity that attaches to [a legislative act] has led this

Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

The complainant attacking a statute's validity must prove that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

Monroe v. State (1994), 265 Mont. 1, 3-4, 873 P.2d 230, 231. In evaluating such challenges, courts should "consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (U.S. 1982).

The Board has offered limiting information in the form of at least two rules. First, Administrative Rule of Montana 24.219.2305, which first became effective on April 25, 1986, describes acts of unprofessional conduct. It is unprofessional conduct for a licensee to "perform . . . , services beyond . . . her field or fields of competence as established by . . . her education, training and/or experience." Admin. R. Mont. 24.219.2305. This rule was in place prior to Clement's becoming licensed in Montana and would apply to all of her conduct. Second, Administrative Rule of Montana 24.219.804, which first became effective on October 17, 2003, describes a code of ethics

for licensed professional counselors. This rule was in place for all of Clement's conduct that occurred after the effective date, including among other things, Clement's retaliatory letter to the Social Security Administration (**Proposed Order: Finding of Fact 17; Department's Exhibit 1(2)(M).**), her effort to have S.H. and B.H. sign a declaration she created that contained a number of falsehoods (**Proposed Order: Finding of Fact 18; Department's Exhibit 1(4).**), her misleading website (**Proposed Order: Finding of Fact 9; Department's Exhibit 1(5)(C)** .), and her continuing misrepresentations to BCBSMT (**Department's Exhibit 1(5)(E)** .) Between the two rules, it should have been clear to a person of ordinary intelligence that the conduct Clement engaged in would be and was forbidden by statute.

The next alleged violation of Clement's rights mentioned in the Petition is Clement's assertion that the Board discussed alternative counseling, apparently at the hearing on exceptions, although there was no discussion of alternative counseling in the Hearing Examiner's Proposed Order. Once again, Clement has utterly failed to cite to the record or relevant authority for facts or law pertinent to her complaint. See discussion of citation to record and authority, *supra* at 8-9. The Board maintains that any references to alternative counseling by a member of the Board at the exceptions hearing was on the initiative of that particular board member individually and not the Board corporately (*see Hrg. on Exceptions Transcr. 29:18, 41: 1, 2, 5 (March 2, 2007)* (hereafter, "Transcript")), and moreover, the discussion was harmless as the Board did not consider or draw upon

any reference to alternative counseling in arriving at the Final Order. indeed, the Board followed the procedure set forth in Mont. Code Ann. § 2-4-621(3) in adopting the Proposed Order as the Board's final order. **(Final Order at 1-2.)**

Clement next argues that the Board violated Petitioner's right to freedom of religion. Again, Clement has failed to identify facts in the record which would support her contention, a specific constitutional provision which would apply to the circumstances of the case, or a specific statute, rule, or Board action that interfered with her religious beliefs. See discussion of citation to record and authority, *supra* at 8-9. Furthermore, Clement's reference to Tennessee customs (or regulations?) is not supported by the record. Under Mont. Code Ann. § 2-4-704(1), judicial "review must be conducted by the court without a jury and must be confined to the record." Accordingly, Clement's claims should be dismissed.

Clement also contends the Board "violated [her] rights to freedom of expression in ruling that Petitioner's website was misleading as she offered 'wild dolphin swims' offered on [her] website." (**Petition at 10.**) The Board denies any infringement of this right because it did not take any action to prohibit or restrict Clement's use of the Internet to disseminate information about dolphin swims. The Board did conclude that "Clement violated Admin R. Mont. 24.219.804(2)(a)(ix) by advertising . . . on her web site that 'swimming with the dolphins' was therapeutic. There is no validated treatment modality in licensed clinical professional counseling that substantiates such

a claim. This makes Clement's web site misleading." **(Proposed Order: Conclusion of Law 11 .)** The Board did not prohibit the swims or advertising of the swims, but rather, penalized Clement for advertising dolphin swims in connection with professional counseling because the Board determined that linking the two was misleading. The link was illegal under Mont. Code Ann. § Admin R. Mont. 24.219.804(2)(a)(ix). Under the Supreme Court of the United States' holding in *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 389 (U.S. 1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."), it is clear that a state may prohibit commercial advertising of matters which are illegal or advertising which is untruthful, misleading, or deceptive. Thus, even if the Board's prohibition of linking dolphin swims and licensed professional counseling was a prohibition of expression, it was a permissible restriction under established Supreme Court precedent.

Clement's final constitutional argument is that the Board's ruling made her an involuntary servant to her clients because the ruling would force her to continue to treat patients due to her ethical obligation to the patient and yet, according to Clement, the ruling would not allow her to charge either the insurance company or clients. **(Petition at 10-11 .)** Yet again,

Clement has failed to cite to the record or relevant authority for facts or law pertinent to her complaint. See discussion of citation to record and authority, *supra* at 8-9. She does not cite the Proposed Order or the Final Order because there is no provision in either document that would prohibit Clement from charging a fee to a client for services rendered. Indeed, Clement's own actions in filing an action in justice court demonstrate, that she was aware that she could pursue reimbursement from clients even where BCBSMT was not obligated to reimburse her. (*See Department's Exhibit 1(3).*)

B. The administrative findings, inferences, conclusions, and decisions were not in excess of the statutory authority of the Board.

Clement argues that the Board's actions violated Mont. Code Ann. § 2-4-704(2)(a)(ii) because they exceeded the agency's statutory authority. Her cursory allegations that the Board's charges lacked definition, persecuted a counselor who used money for therapeutic purposes where the use is permitted, used a subjective view of the role of a counselor, failed to provide notice of unacceptable counseling practices, and failed to publicize prohibited therapies are not supported by any reference to the record. That problem is compounded by her failure to identify how these alleged acts exceed the statutory authority of the board. As a result of these failures, neither the Board nor the Court can address her contentions. *See* discussion of citation to record and authority, *supra* at 8-9.

C. The administrative findings, inferences, conclusions, and decisions were not made upon an unlawful procedure.

Clement believes that the Board's actions were based upon unlawful procedure as a result of the Hearing Examiner's decisions limiting some lines of questioning, a failure to better define charges of false advertising, and the Hearing Examiner's decision to allow Dr. Olson to testify without producing subpoenaed materials. A hearing examiner is entitled to deference when weighing evidence and determining the credibility of witnesses. *Ray v. Mont. Tech of the Univ. of Mont.*, 2007 MT 21, ¶ 50. The Supreme Court has held,

under § 2-4-704(2), MCA, a court reviewing an agency decision may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. As long as we determine that substantial credible evidence exists to support the findings of the trier of fact, we may not re-weigh the evidence, but must instead defer to the Hearing Examiner. "A hearing examiner, when one is used, is in the unique position of hearing and observing all testimony entered in the case. . . . The findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference."

Benjamin v. Anderson, 2005 MT 123, ¶ 37. An appellate court reviews a lower court's evidentiary rulings for an abuse of discretion. *McDermott v. Carle, LLC*, 2005 MT 293, P10, 329 Mont. 295, P10, 124 P.3d 168, P10. Absent a showing of such abuse the court should not overturn the lower court's ruling on the admissibility of evidence. *Id.* The trial court abuses its discretion if it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Id.*

In the instant case, Clement has shown no such abuse of discretion in terms of the admission or exclusion of evidence. Therefore, the Proposed Order was not based on an unlawful procedure.

D. The administrative findings, inferences, conclusions, and decisions were not affected by other errors of law.

Clement alleges that the Board's decision should be reversed because the Board's findings, inferences, conclusions, and decisions were affected by other errors of law in violation of Mont. Code Ann. § 2-4-704(2)(a)(iv). (**Petition at 12.**) This contention again suffers from a lack of support in the record and citation to authority. In terms of her legal argument, Clement cites only a rule of professional conduct for an unidentified profession in Tennessee. *Id.* Because of its similarity to Mont. R. Prof. Conduct 1.6(b), the Board has surmised that this is a rule pertaining to the conduct of lawyers; however, this is mere speculation. In any case, a rule that pertains to the conduct of a profession other than professional counseling or the

conduct of any profession in another state is not binding on the Board or the Court.

E. The administrative findings, inferences, conclusions, and decisions were not clearly erroneous.

Clement contends that the Board's decision should be reversed because it was clearly erroneous pursuant to Mont. Code Ann. § 2-4-704(2)(a)(v) in light of the reliable, probative, and substantial evidence. Putting Mont. Code Ann. § 2-4-704 to practical application, the Supreme Court has held that when reviewing an administrative agency's findings of fact, courts shall defer to the agency's findings unless they are clearly erroneous. Section 2-4-704(2)(a)(v), MCA; *Westmoreland Resources v. Dep't of Revenue* (1994), 263 Mont. 303, 310, 868 P.2d 592, 596. Generally, findings of fact are not clearly erroneous if they are supported by substantial credible evidence. *Westmoreland Resources*, 868 P.2d at 596. Substantial evidence must be more than a scintilla, but may be less than a preponderance, of evidence. *In re Marriage of Davies* (1994), 266 Mont. 466, 472, 880 P.2d 1368, 1372.

The Court has further adopted a three-part test to determine if an agency's decision is clearly erroneous. First, the Court must review the record to see if the findings are supported by substantial evidence. A finding of fact is binding on the Court if it is "supported by substantial evidence, regardless of whether there is substantial evidence or even a preponderance of evidence to the court." *Gypsy Highview Gathering System, Inc. v. Stokes* (1986), 221

Mont. 11, 716 P.2d 620. Second, if the findings are supported by substantial evidence, the Court must determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." *State Compensation Mutual Insurance Fund, v. Lee Rost Logging* (1992), 252 Mont. 97, 102, 827 P.2d 85, 88.

Clement alleges that the Hearing Examiner "ignored substantial evidence put before him." The Board contends that there is no evidence that any witness' testimony was ignored, and the Board submits that even if that were the case, the Hearing Examiner is entitled to weigh all of the evidence in the case and make a determination in spite of the fact that there may be some contradictory evidence. See *Benjamin v. Anderson*, 2005 MT 123, ¶ 55, 327 Mont. 173, ¶ 55, 112 P.3d 1039, ¶ 55 ("[T]he standard is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the findings."). The Board was entitled to accept Dr. Olson's testimony in spite of the fact that there may have been some contradictory evidence.

F. The administrative findings, inferences, conclusions, and decisions were not arbitrary, capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.

Clement argues that, at the hearing on exceptions, the Board presented charges that had not been raised before, a Board member accepted the Proposed Order even though she believed that Clement had billed in the standard fashion, and the Board did not follow its own rules of procedure. Once again, Clement gave the Board and the Court no direction to places in the record that would support her contentions. See discussion of citation to record and authority, *supra* at 8-9. In terms of Clement's allegation that a Board member said that Clement's billing was done in "the standard way," a search of the Transcript fails to reveal any such comment. Board Member Linda Crummett does say that it is standard practice to bill the client when a claim is rejected by the insurer (**Transcript at 44:20-22**.); however, the Board made no such finding. Moreover, billing the client after a claim was rejected by the insurer was not alleged or determined to be a violation of law. See **Proposed Order; Final Order**. Clement offers absolutely no clue as to what new charges were presented or what improper procedure was followed at the hearing on exceptions. Consequently, the Board does not address those claims here.

CONCLUSION

Rule 56(c), Mont. R. Civ. P., provides that "[t]he judgment sought shall be rendered forthwith" if the pleadings, admissions on file, and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." As evidenced above, the record in this case shows that there is no genuine issue of material fact. For the

reasons stated herein, the Department respectfully requests that the Court grant the Department's Motion for Summary Judgment and issue an Order accordingly.

DATED this 30th day of May, 2007.

Respectfully Submitted

s/ Don E. Harris

DON E. HARRIS

Counsel for the Respondents
State of Montana, Department of
Labor And Industry, Board of
Social Work Examiners and
Professional Counselors

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May 2007, I served a true and accurate copy of the foregoing, first class, U.S. mail, postage prepaid, upon the Licensee addressed as follows:

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Pro Se

**MONTANA FIRST JUDICIAL DISTRICT
COURT, LEWIS AND CLARK COUNTY**

MARY J. CLEMENT,) Cause No. BDV-2007-329
)
Petitioner,)
)
vs.	) BRIEF IN OPPOSITION
	) TO RESPONDENTS'
STATE OF MONTANA,	) MOTION FOR
DEPARTMENT OF	) SUMMARY JUDGMENT
LABOR AND)
INDUSTRY, BOARD)
OF SOCIAL WORK)
EXAMINERS AND)
PROFESSIONAL)
COUNSELORS,)
)
Respondents.)

COMES NOW MARY J. CLEMENT ("Clement" or "Petitioner"), pro se, and respectfully submits this Brief in Opposition to the Motion for Summary Judgment filed by the Respondents, State of Montana, Department of Labor and Industry and the Montana

Board of Social Work Examiners and Professional Counselors (hereafter collectively referred to as "Board").

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Clement, as a licensed clinical professional counselor, met B.H. in February 2001 and her husband, S.H., in September 2001, and counseled them on a variety of personal issues in the office and in their home due to crises, as defined by the clients or the clients psychiatrist Dr. Olson. Clement terminated the counseling relationship when she moved to Tennessee at the end of December 2001. B.H. reestablished the relationship by calling Clement in Tennessee, claiming that B.H. had attempted suicide. Clement worked with both B.H. and S.H. in March and April 2002, and returned to Tennessee, where B.H. maintained the relationship through telephone counseling. During late June, July, and through mid-August 2002, Clement worked with B.H. and S.H. through the crises, fights, and threats of divorce, while helping them to regain control over their trashed house. The counseling relationship ended with the completion of the goals of treatment in August 2002, and no future appointments were made by the clients. B.H. reestablished counseling services for a week in September 2002, and then again in late October 2002, after she had begun a thirty-hour-per-week job as a cook for a ranch.

B.H. and S.H. filed a complaint with the Board on November 4, 2003. The complaint was based upon two major concerns: (1) billing Blue Cross and Blue

Shield of Montana "BCBSMT" for overtime in counseling sessions on dates other than when the services were rendered (a customary practice called "carry over") and (2) charging B.H. and S.H. for telephone counseling not covered by BCBSMT, wherein B.H. called the Petitioner from Montana and reestablished the terminated counseling relationship with Clement, after Clement had permanently moved to Tennessee in late December 2001. The complaint was filed because B.H. and S.H. were to appear in Justice Court on November 17, 2003, respecting a case in which Clement was asking B.H. and S.H. to pay for the services not covered by BCBSMT—the telephone counseling. B.H. and S.H. argued in their complaint that the telephone counseling never occurred. The provider contract between BCBSMT and the Petitioner, pursuant to which the Petitioner provided the counseling services to B.H. and S.H., was silent as to a provider's entitlement to overtime compensation for sessions necessarily running longer than the seventy-five minutes established by the BCBSMT 90808 Code.

The Board furnished Clement with notice of the complaint by certified mail on November 19, 2003. The Petitioner had just returned from the Montana court hearing, and wanted to communicate with BCBSMT and Social Security Disability authorities. A copy of the complaint procedure was enclosed with the letter as a brochure. The brochure explained that the procedure was initiated by a complaint. Once the complaint was filed, a letter requesting a response would be sent. In time, one or both of the complaint and response would be sent to a Screening Panel for

review and consideration. The brochure stated that, after the Screening Panel met, the Panel could request an investigation, determine whether reasonable cause existed for issuance of a Notice of Proposed Board Action, or dismiss the complaint with or without prejudice.

On December 1, 2003, Clement transmitted materials to the Board responsive to the complaint filed by B.H. and S.H. On July 26, 2004, BCBSMT submitted materials to the Screening Panel. An investigator for the Board called Clement and asked for additional information to provide to the Screening Panel. There was no interview. Clement sent the requested materials on August 22, 2004. Clement was unaware the BCBSMT had furnished materials to the Screening Panel, because BCBSMT had not responded to Clement's April 2004 letter requesting more information on some of the findings set forth in BCBSMT's March 2004 letter.

The Screening Panel met in September 2004, without permitting Clement to speak. She then became aware that the Board possessed information that was being used against her, which she could have refuted with documentation had she been given notice of the issues and an opportunity to be heard. The Board drew up the charges as a statement of facts and then listed separate violations.

Following the Screening Panel's meeting, the Board asserted twenty-seven facts, with five charges set forth under Mont. Code Ann. § 37-1-316, one charge under § 37-22-301, and six charges under Mont.

Admin. R. 24.219.804, the Code of Ethics. False advertising was listed as a charge under § 37-1-316 and Rule 24.219.804, but the charges were not connected to specific facts, so the Petitioner had no notice of what issues were to be addressed.

Clement contested the charges. Clement filed a Motion to Strike or for a More Definite Statement. The Hearing Examiner held a telephone conference regarding the QXCI Machine identified by BCBSMT investigator Karl Krieger as a "quack" machine, as part of the nearly two inches of materials presented to the Screening Panel without notice to the Petitioner or an opportunity to respond. In the formulating the charges, the Screening Panel used materials submitted from a Stephen Barrett, M.D., who described the QXCI Machine as "a functionally useless diagnostic tool". The Hearing Examiner never addressed Clement's request for a more definite statement as to the charges. Clement was denied notice because the requested information was never furnished.

A contested-case hearing was conducted on May 25-26, 2006, and August 17-18, 2006, with the Department putting on its case, and Clement being allowed to cross-examine some of the witnesses. The Board narrowed the charges into billing fraud, retaliation/interference with discipline process, dual relationships (boundary violations), breach of confidentiality, and misleading advertising. Clement filed her closing arguments, and the Board responded on October 13, 2006. Following the hearing, the Hearing Examiner issued Proposed Findings of Fact, Conclusions of Law, and Recommended Order on

December 8, 2006. The Hearing Examiner recommended revocation of the Petitioner's license.

Clement filed exceptions and objections, and requested oral argument before the Adjudication Panel of the Board. In her oral arguments, the Petitioner questioned the standard of proof and the Hearing Examiner's claim that the Petitioner billed BCBSMT for B.H.'s telephone counseling. (See Proposed Order, #7, p. 10). Even after a discussion by the Board, which included Board-member statements that Clement had properly submitted requests for payment for telephone counseling sessions under a code which BCBSMT would not pay, the Board voted to adopt, verbatim, the Proposed Findings of Fact, Conclusions of Law, and Recommended Order. The Board's final order was entered on March 26, 2007, and was sent to Clement on March 30, 2007. There was no mention of any process by which to appeal the Board's decision. Clement subsequently filed this timely action for judicial review.

ARGUMENT

I. STANDARDS OF REVIEW.

The Montana Administrative Procedure Act ("APA") sets forth the standards of judicial review of a contested case. Section 2-4-704 provides in relevant part:

§ 2-4-704. Standards of review

(1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities maybe taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

* * *

Mont. Code Ann. § 2-4-704. (Emphasis added.)

The decision of an administrative agency in a contested case is reviewed to determine whether the findings of fact are clearly erroneous. *E.g.*, *Montana Solid Waste Contractors, Inc. v. Montana Department of Public Service Regulation*, 2007 MT 154, ¶ 16, — P.3d —, —, 2007 WL 1828950, *3. By contrast, the court reviews the agency's conclusions of law to determine whether the agency correctly interpreted the law. 2007 MT 154, ¶ 16; *see also Westmoreland Resources, Inc. v. Montana Department of Revenue*, 263 Mont. 303, 310, 868 P.2d 592, 596 (1994) (upon judicial review, court defers to agency's findings of fact unless they are clearly erroneous, that is, they are not supported by substantial credible evidence; court reviews agency's legal conclusions simply to determine whether they are correct). A finding of fact is clearly erroneous if it is not supported by substantial

evidence, or, if it is supported by such evidence, if the agency misapprehended the effect of the evidence. *Montana Solid Waste Contractors, Inc.*, 2007 MT 154, ¶ 17. Even if substantial evidence exists, and the agency has not misapprehended the effect of the evidence, a reviewing court may nevertheless decide that a finding is clearly erroneous if a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. *Id.*

In the case at bar, the Petitioner will demonstrate herein that the Board's decision to revoke her counselor's license was in violation of constitutional provisions, was made upon unlawful procedure, and was affected by other errors of law. Accordingly, the Court must reverse the decision pursuant to Mont. Code Ann. § 2-4-704.

Due to the magnitude of the potential deprivation in such cases, an agency's burden of proof in license-revocation proceedings should be greater than the preponderance-of-the-evidence standard applied in ordinary civil cases. Although no Montana court has squarely addressed the issue of the appropriate burden of proof in license-revocation proceedings, a majority of courts which have faced the question have determined that an agency's burden of proof in matters involving the revocation of a professional license is clear and convincing evidence. See, e.g., *In re Tinklenberg*, 716 N.W.2d 798, 802 (S.D. 2006); *Billings v. Wyoming Board of Outfitters & Professional Guides*, 88 P.3d 455, 462 (Wyo. 2005) (a disciplinary proceeding before a licensing board is an adversary proceeding, where the burden is on the

complaining party to present its case in a proper manner, and to state with precision the charges against the licensee; those charges must be established by clear and convincing evidence); *State ex rel. Oklahoma State Board of Examiners of Certified Shorthand Reporters v. Parrish*, 152 P.3d 202, 203 (Okla. 2006) (standard of proof in cases involving suspension or revocation of professional license is clear and convincing evidence); *State ex rel. Oklahoma Board of Medical Licensure & Supervision v. Litchfield*, 103 P.3d 1111, 1115 (Okla. Civ. App. 2004) (allegations in an action involving the revocation of a professional license must be proven by clear and convincing evidence); *Gray v. Superior Court*, 23 Cal. Rptr. 3d 50, 56 (Cal Ct. App. 2005) (standard of proof to revoke or to suspend a professional health care license is clear and convincing proof to a reasonable certainty, and not a mere preponderance of the evidence); *Nair v. Department of Business & Professional Regulation*, 654 So. 2d 205, 207 (Fla. Dist. Ct. App. 1995) (evidence must be clear and convincing to revoke or to suspend a professional license).

In the present case, given the nature of the deprivation to which the Petitioner may be subjected, i.e., the revocation of her professional counseling license, the Court should apply the clear-and-convincing-evidence standard adopted by a substantial majority of the courts which have considered the issue of an administrative agency's burden of proof in professional-license-revocation proceedings. As discussed below, under this standard, and even under the less rigorous preponderance-of-

the-evidence standard, the Board's decision violates the APA, and must be reversed.

II. THE BOARD COMMITTED AN ERROR OF LAW IN DECIDING THAT THE PETITIONER WAS GUILTY OF BILLING FRAUD, BECAUSE THE PETITIONER'S PROVIDER CONTRACT WITH BCBSMT WAS SILENT AS TO THE PAYMENT OF OVERTIME COMPENSATION.

An insurer is obligated to reimburse a health care provider when the provider contract between the insurer and the provider is silent about the costs of the particular treatment, and the insurer's conduct has suggested that the costs were covered. *See Response Oncology, Inc. v. Blue Cross & Blue Shield of Missouri*, 941 S.W.2d 771, 777 (Mo. Ct. App. 1997).

In the present case, even assuming for the sake of argument that the Petitioner was not entitled to carry over her billing for counseling sessions that, due to the emotional state of the patient and the progress of the session, necessarily exceeded the seventy-five minutes allotted by BCBSMT's Code 90808, the Petitioner's carry-over billing does not constitute billing fraud in violation of the Petitioner's professional obligations. Mont. Code Ann. § 37-1-316(4) provides that it is unprofessional conduct for a licensee to sign or to issue a document or statement that the licensee knows to contain a false or misleading statement. Similarly, Mont. Admin. R.

24.219.804(2)(a)(i), part of the Code of Ethics for Licensed Professional Counselors, prohibits a licensee from committing fraud or misrepresenting the services performed. Fraud consists of nine elements: (1) a representation, (2) the falsity of that representation, (3) the materiality of the representation, (4) the speaker's knowledge of the representation's falsity or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the representation's falsity, (7) the hearer's reliance upon the truth of the representation, (8) the hearer's right to rely upon the representation, and (9) the hearer's consequent and proximate injury or damages caused by his or her reliance upon the representation. *E.g., In re Estate of Kindsfather*, 2005 MT 51, ¶ 17, 326 Mont. 192, 196, 108 P.3d 487, 490. Here, Clement was not aware of the falsity, if any, of her billing statements for overtime sessions, because her provider contract with BCBSMT was silent as to payment or prohibition against payment for sessions running longer than the period provided by Code 90808. The Petitioner reasonably believed that she could submit invoices for such payment, in light of the absence of any provision addressing such compensation in her provider contract with BCBSMT. If she was incorrect about her contractual right to such payment, she did not commit *fraud* in submitting bills for overtime sessions.

It has been held that a claim for overtime pay under a contract is permissible, when the contract is silent regarding such pay. *See Spears v. Miller*, 2006 WL 2808145, *3 (Mass. App. Ct. 2006). Silence in a

contract creates an ambiguity when such silence involves a matter naturally within the scope of the contract. See *Public Service Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo 2006). If the language of a contract is silent as to an essential matter, extrinsic evidence may be introduced on the issue. See *Cleary v. News Corp.*, 30 F.3d 1255, 1263 (9th Cir. 1994); *Thompson v. United States Department of Labor*, 885 F.2d 551, 556 (9th Cir. 1989). Moreover, when a contract is silent or ambiguous as to a particular term, a court may supply a reasonable term to effectuate the parties' agreement, if the other terms of the contract are clear and definite. *In re Marriage of Eilers*, 205 S.W.3d 637, 645 (Tex. Ct. App. 2006) (review denied).

In the case at bar, Clement's provider contract with BCBSMT was ambiguous as to compensation for overtime sessions, in that the contract failed to address this question. This question constituted an essential matter, the payment of compensation for services provided to an insured. Hence, extrinsic evidence was admissible to resolve this ambiguity. The Petitioner introduced evidence that licensed Montana providers customarily engage in carry-over billing to cover time which is not compensable within a single session or treatment. Even assuming that the Petitioner's legal position was incorrect, and that she was not entitled to overtime compensation under her provider contract, the issue in these proceedings is not whether the Petitioner misunderstood her contractual rights, but whether she committed billing fraud. Because the provider contract was ambiguous on this crucial point, and in light of the evidence before the Board that, in

fact, Montana providers do employ carry-over billing, Clement was unaware of the falsity of her billing statements, and, accordingly, cannot be found guilty of fraud under Montana law. For these reasons, the Board committed an error of law in concluding that the Petitioner was guilty of billing fraud, and its decision must be reversed.

III. THE BOARD'S DECISION WAS IN VIOLATION OF CONSTITUTIONAL PROVISIONS, AND WAS MADE UPON UNLAWFUL PROCEDURE, BECAUSE THE PETITIONER WAS DENIED AN OPPORTUNITY TO REVIEW THE MATERIALS SUBMITTED TO THE SCREENING PANEL, AND THE BOARD INTRODUCED ISSUES THAT WERE NOT RAISED AT THE HEARING ON THE CHARGES.

The requirements for procedural due process are: (1) notice and (2) an opportunity for a hearing appropriate to the nature of the case. *E.g., Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 30, 334 Mont. 237, 247, 146 P.3d 759, 767; see *Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 65, 314 Mont. 121, 137, 63 P.3d 1129, 1140 (due process requires both notice of a proposed action, and the opportunity to be heard). The procedural due process which is required in any given case varies according to the circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision. *Montanans for Justice*, 2006 MT 277, ¶ 30.

The right to due process requires sufficient advance notice of the evidence which will be presented at a hearing. *Id.*, 32, 33.

Here, the Petitioner was denied her due-process rights of notice and an opportunity to be heard, when the Board permitted BCBSMT to submit voluminous materials regarding the Petitioner without providing the Petitioner an opportunity to review the materials in order to develop her defenses. The Montana Supreme Court has held that a party to screening-panel proceedings possesses a constitutional right to use evidence presented to the screening panel in subsequent proceedings. See *Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981). A screening panel's findings constitute an item of evidence in later proceedings. See *Barrett v. Baird*, 908 P.2d 689 (Nev. 1995).

In the case at bar, the Screening Panel's findings constituted evidence in the hearings before the Hearing Examiner and the Board, as well as on this action for judicial review. However, the Petitioner was deprived of notice and an opportunity to review the materials submitted to the Screening Panel by BCBSMT. As discussed above, the Petitioner had a constitutional right to use the evidence presented to the Screening Panel in subsequent proceedings in this case, a right which she was denied because she was not permitted to review the evidence submitted to the Screening Panel, or to use such evidence to develop her defenses. The Screening Panel's findings, when made, became evidence, but they were evidence from the development of which the Petitioner was wrongfully

excluded. For these reasons, the Board's decision was made in violation of the Petitioner's constitutional right to due process, and upon unlawful procedure. Accordingly, the Board's decision must be reversed. See Mont. Code Ann. § 2-4-704(2)(a)(i), (iii).

In addition, the Board's decision violated the Petitioner's constitutional right to procedural due process because the Board raised issues which were not addressed in the proceedings before the Hearing Examiner. For instance, the Board cited the Licensed Professional Counselors Code of Ethics in asserting that the Petitioner violated her ethical obligations by using the Homebuilder Model, even though the Board had approved the use of similar models previously. (See Transcript of Proceedings, Full Board Meeting, dated March 2, 2007, attached as Exhibit A, at 21; Proposed Findings of Fact and Conclusions of Law, attached as Exhibit B, at 8, 11-12.) Moreover, nowhere in the proceedings before the Screening Panel, the Hearing Examiner, or the Board was the dual relationship allegedly created by the use of the Homebuilder Model identified. Dual relationships are not prohibited per se, in that the Board has approved their use when they are proved to be therapeutic and are conducted under supervision. The Petitioner was being supervised in her treatment of B.H. and S.H. by Dr. Roger Dale Barnes. (See Exhibit A at 21.) In addition, the Board found that the Petitioner's website, administered from her office in Tennessee and not designed solely for patients in Montana, violated the ethical prohibition against false advertising by promoting that swimming with dolphins is therapeutic. (See Exhibit B at 11.) However, the record

demonstrates that Clement never offered dolphin swims as a counseling technique. In addition, the Board's and the Hearing Examiner's conclusions are based upon the erroneous assumption that the Petitioner's Montana counseling license controlled the Petitioner's entire website. All of these acts by the Board and the Hearing Examiner violated the Petitioner's constitutional right to procedural due process because the Petitioner was not provided with notice as to the matters being considered, or as to the standards which the Petitioner allegedly violated.

A party's due-process rights are satisfied when he or she receives notice of the alleged violation, the evidence against the party is disclosed, and the party is afforded the opportunity to present evidence and to cross-examine witnesses. *See State v. Kingery*, 239 Mont. 160, 165, 779 P.2d 495, 498 (1989). Indeed, the APA mandates that, in a contested case, a party be given notice which includes a plain statement of the matters asserted. *See* Mont. Code Ann. § 2-4-601(2)(d). The Petitioner was charged with violating the requirements of Mont. Code Ann. § 37-1-316(4), (9), (15), and (18). These provisions state:

§ 37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

* * *

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

* * *

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

* * *

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

Mont. Code Ann. § 37-1-316.

The Petitioner was also charged with violating the following provisions of the Montana Administrative Code:

**24.219.804. CODE OF ETHICS -
LICENSED PROFESSIONAL
COUNSELORS**

* * *

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

* * *

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

* * *

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

* * *

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information;

* * *

Mt. Admin. R. 24-219.804.

In the present case, the Petitioner was not provided with notice as to the identity of the dual relationship allegedly created by her use of the Homebuilder Model, or as to which of the foregoing standards prohibited her use of that model. In other

words, the cited provisions provided the Petitioner with no notice of the standard to which her conduct was required to conform. Similarly, the provisions cited by the Department provided the Petitioner with insufficient notice of how her website, created and administered in Tennessee, constituted false advertising in Montana, in light of the evidence that the Petitioner never offered dolphin swims to Montana residents as a counseling technique. For these reasons, the Petitioner's due-process rights to notice and an opportunity to be heard were violated, and the Board's decision was based upon an unlawful procedure. Consequently, the decision must be reversed.

IV. THE BOARD'S DECISION WAS IN VIOLATION OF CONSTITUTIONAL PROVISIONS, BECAUSE THE DEFINITION OF "HARM" TO A PATIENT, FOR PURPOSES OF LICENSE REVOCATION, IS UNCONSTITUTIONALLY VAGUE.

Neither Mont. Code Ann. § 37-1-316 nor Mont. Admin. R. 24-219.804, the provisions under which the Petitioner was charged, defines "harm" for purposes of the revocation of the license of a professional counselor. Moreover, there are no Montana decisions which define the term "harm" for such purposes. Mont. Admin. R. 24.219.2305(1)(b), which sets forth the elements of unprofessional conduct for professional counselors, provides that intentionally causing "physical or emotional harm to a client" is unprofessional conduct. In its brief, the Department cites Mont. Admin. R. 24.219.2305(1)(b) as defining

conduct that does not meet the generally accepted standards of practice for purposes of establishing unprofessional conduct by a professional counselor. However, this rule, and the statute allegedly incorporating it, contain a constitutionally insufficient standard by which the acts of professional counselors may be judged.

A statute may be challenged as violative of the right to due process based upon its vagueness on two grounds: (1) that the statute is so vague that it is void on its face, or (2) that the statute is vague as applied in a particular situation. *E.g.*, *State v. Turbiville*, 2003 MT 340, ¶ 18, 318 Mont. 451, 457, 81 P.3d 475, 479. A noncriminal statute is unconstitutionally vague in violation of due process if a person of common intelligence must guess at its meaning. *Wing v. State ex rel. Department of Transportation*, 2007 MT 72, ¶ 12, 336 Mont. 423, 426, 155 P.3d 1224, 1226.

In the case at bar, the statute and rule upon which the Board has relied in revoking the Petitioner's license for causing "harm" to B.H. and S.H. are unconstitutionally vague, because they purport to allow the revocation of the Petitioner's license upon evidence which clearly indicates that the Petitioner did no harm to her clients. Hence, the Petitioner was placed into the position of having to guess at the meaning of these provisions. Specifically, the record indicates that Dr. Olson, who saw B.H. following her counseling by the Petitioner, did no new scientific testing or outside evaluation relative to B.H.'s assertion that she "no longer trusted counselors." (See Transcript, May 25, attached as Exhibit C, p.89, l.16,

p.190,11.18-19.) B.H.'s lack of trust in counselors is not the result of her counseling with Clement. Rather, it is a characteristic of Borderline Personality Disorders, as documented by the following:

1. The Minnesota Multiphasic Personality Inventory-2, performed in the office of Dr. Olsen on October 29, 1999, reported that persons with B.H.'s condition "have difficulty establishing a treatment relationship because they mistrust other people. The client is so emotionally and socially alienated that it would be difficult for a therapist to gain her confidence." (Petitioner's Exhibit D, p.5,11.13-15.)
2. The Dismissal Summary from Dr. Olson's commitment of B.H. to Deaconess Billing Clinic for noncompliance with medication orders and out-of-control behavior, probably leading to a manic episode with suicidal ideation on May 11, 2000. In his history of B.H.'s present illness, Dr. Wall reported: "On my interview with her she is quite short and essentially refuses to communicate. The patient denies any active suicidal ideation at present, however, there is ample

documentation that this has been an ongoing problem of hers from Dr. Olson" and "there is also a strong odor of alcohol on the patient although she adamantly denies any drinking" (page 3 under mental status evaluation, lines 6-10) (Clement's Exhibit 1 (6) p. 57-65).

3. Testimony of Dr. Hillegass, who saw B.H. in regular, consistent psychotherapy from September 2000 until April 2001, in which he stated: "Complaining and threatening to quit therapy and then calling mid-week with emergencies and demanding to be seen . . . continued to demonstrate . . . generally indicative of borderline personality disorder." (Transcript, August 17, p.154, 11. 20-21, 1. 25; page 155, 11. 1-2). (Stopping and then reestablishing counseling is the typical pattern for this type of client and happened on at least three major occasions with Clement as well.)

After treatment by the Petitioner, B.H. has never been hospitalized, has held her job as a cook for the Starwind Ranch for "a little over a year" (Transcript, May 25, p. 88, l. 9), is amicably separated from her husband with whom she had many crises (id.

p.87,11. 12-20), and has taken up residency and become an assistant manager in one of the locations recommended by Clement with Isabelle Marlow, who manages a federal housing unit. (Transcript, May 25, p. 87, ll. 21-25; p. 88, l.1)

Hence, the Board concluded that the Petitioner caused harm pursuant to a statute and rule that are so impermissibly vague as to allow a finding of harm, despite the foregoing uncontroverted evidence of record that B.H. palpably improved under the Petitioner's treatment. Because the statute and rule allow such a result, a professional counselor in the position of the Petitioner is reduced to guessing at the meaning of these provisions, and what they proscribe. Accordingly, the Board's decision was made in violation of the Petitioner's due-process rights, and must be reversed.

CONCLUSION

For all the foregoing reasons, the Petitioner, Mary J. Clement, respectfully requests that this Honorable Court deny the Respondents' Motion for Summary Judgment.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE
STATE OF MONTANA**

NO. DA 08-0077

**MARY J. CLEMENT,
Petitioner-Appellant,**

vs.

**STATE OF MONTANA, DEPARTMENT OF
LABOR AND INDUSTRY, BOARD OF SOCIAL
WORK EXAMINERS AND PROFESSIONAL
COUNSELORS,**

Respondents-Appellees

**APPEAL FROM MONTANA FIRST JUDICIAL
DISTRICT COURT
LEWIS AND CLARK COUNTY
HONORABLE JEFFREY M. SHERLOCK, D.C.J**

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Montana First Judicial District Court, Lewis and Clark County ("the District Court"), erred in concluding that the due-process rights of the Petitioner-Appellant (hereinafter "Clement") were not violated, when the statutes and regulations upon which Respondent-Appellee Board of Social Work Examiners and Professional Counselors (hereinafter "the Board") relied in charging Clement with professional misconduct and in revoking her license are unconstitutionally vague, and Clement was not

furnished in a timely manner with the materials provided to the Screening Panel.

II. Whether the District Court erred in concluding that Clement committed billing fraud, when the record establishes that Clement was advised and believed that carry-over billing was established and appropriate in the community of licensed professional counselors in Montana, and that Clement reasonably believed that her use of the Homebuilder Model of professional counseling, under which patients may be treated outside the confines of a counselor's office, was an approved therapeutic methodology in Montana.

III. Whether the District Court's finding that Clement's use of a dual relationship violated professional standards was clearly erroneous, when there was no evidence in the record identifying the relationship to which the court referred and upon which Clement was charged with professional misconduct, and the record established that dual relationships, in general, can be appropriate in circumstances like those of the present case.

IV. Whether the District Court erred in concluding that Clement breached her professional obligation of confidentiality, when the record establishes that the patient at issue did not receive counseling in front of third parties, the patient herself chose to receive counseling outside Clement's office setting, and the law provides that a patient may waive his or her right to confidentiality by allowing otherwise privileged information to become known outside the counseling relationship.

V. Whether the District Court erred in concluding that Clement breached her professional obligations with respect to the representations made on her website, when the Board failed to prove that any representations were false or misleading.

STATEMENT OF THE CASE

These are professional license-revocation proceedings which were initiated by the Board. In November 2003, acting on a complaint received from B.H. and S.H., to of Clement's patients, the Board commenced disciplinary proceedings against Clement. The case went initially to the Screening Panel, and was then referred to a Hearing Examiner. A four-day contested-case hearing was conducted in August 2006. In December 2006, the Hearing Examiner submitted his Proposed Findings of Fact, Conclusions of Law, and Recommended Order. The Hearing Examiner recommended that Clement's license as a clinical professional counselor be revoked for unprofessional conduct on several grounds: (1) knowingly billing for counseling services provided to B.H. and S.H. on dates Clement did not provide services, (2) retaliating against B.H. and S.H. for filing their complaint by sending an unsolicited letter to the Social Security Administration asserting that B.H. was a malingerer, (3) engaging in improper dual relationships with B.H. and S.H., (4) counseling B.H. and S.H. in front of third parties, and (5) advertising on her Tennessee website that "swimming with the dolphins" is therapeutic. On March 26, 2007, the Board adopted the recommended order in its entirety.

Clement filed a Petition for Judicial Review in the District Court. The Board filed a motion for summary judgment, which the district court denied. The parties then filed briefs in support of and in opposition to Clement's Petition for Judicial Review. The district court conducted a hearing on October 20, 2007, at which the parties presented their arguments.

On January 11, 2008, the District Court¹ affirmed the Board's final order adopting the Hearing Examiner's recommendation. The court concluded specifically: (1) that Clement was given ample warning of what conduct was prohibited, and was adequately provided with the materials submitted to the Screening Panel, (2) that Clement committed billing fraud based upon (a) her use of the Homebuilder Model of counseling, which, the court found, blurred the relationship between professional and personal activities and permitted billing for occasions when no counseling took place, (b) Clement's retaliation against B.H. for her filing of a complaint, and (c) Clement's attempt to have the clients sign a declaration¹ to validate her billing practices, (3) that Clement's use of the Homebuilder Model created an improper dual relationship, (4) that Clement inappropriately provided counseling to B.H. in front of third parties, and (5) that Clement's website contained false advertising. (See Appendix [hereinafter "App."] at 11-14.) Clement filed

¹The declaration was mandated by the district court in Clement's action against B.H. and S.H. for unpaid telephone counseling, pursuant to the district court's order to mediate or to settle.

a timely notice of appeal from the District Court's judgment.

STATEMENT OF FACTS

Clement professionally met B.H. in February 2001, and her husband, S.H., in September 2001. Clement was engaged to counsel B.H. and S.H. on a variety of personal issues. The counseling occurred in Clement's office, in the clients' home, and at ~~other~~ locations where problems arose. Such counseling was necessary due to crises being experienced by B.H. and S.H., as defined by the clients or the clients' psychiatrist, Dr. Kenneth Olson. Clement terminated the counseling relationship when she moved to Tennessee at the end of December 2001. B.H. reestablished the relationship by calling Clement in Tennessee to tell Clement that B.H. had attempted suicide. Clement worked with both B.H. and S.H. in March and April 2002, and then returned to Tennessee, where B.H. maintained the counseling relationship through telephone contacts. During late June, July, and through mid-August 2002, Clement counseled B.H. and S.H. with respect to fights, threats of divorce, and other crises, while helping the clients regain control over their deplorable living conditions and dilapidated house. The counseling relationship ended with the completion of the goals of treatment in August 2002, and no future appointments were made by the clients. B.H. reestablished counseling services for a week in September 2002, and then again in late October 2002, after she had begun a thirty-hour-per-week job as a cook for a ranch.

The complaint filed with the Board by B.H. and S.H. was based upon two major concerns: (1) billing Blue Cross and Blue Shield of Montana "BCBSMT" for overtime in counseling sessions with reference to dates other than when the services were rendered (a practice called "carry over billing") and (2) charging B.H. and S.H. for telephone counseling not covered by BCBSMT, under circumstances in which B.H. telephoned Clement from Montana and reestablished the terminated counseling relationship with Clement, after Clement had permanently moved to Tennessee in late December 2001. B.H. and S.H. filed their complaint against Clement just before they were to appear in Justice Court on November 17, 2003, in a case in which Clement sought to recover payment from B.H. and S.H. for the telephone-counseling services not covered by BCBSMT.

The provider contract between BCBSMT and Clement, pursuant to which Clement furnished the counseling services to B.H. and S.H., was silent as to a provider's entitlement to overtime compensation for sessions necessarily running longer than the seventy-five minutes established by BCBSMT Code 90808. (See Transcript of Proceedings before Board, May 25, 2006 [hereinafter "Tr. 5125106"], at pp. 29-30.) BCBSMT admitted its lack of knowledge about the use of what it deemed the "22 modifier" for overtime compensation, and stated that Clement was the first counselor to inquire about its use. (See Transcript of Proceedings before Board, August 17, 2006 [hereinafter "Tr. 8117106"], at p. 16, 1. 22 to p. 17, 1. 23.) Clement was never informed that she should not employ carry-over billing for sessions which were

required to run longer than the allotted time established by BCBSMT's billing codes. *See* Transcript of Proceedings before Board, May 26, 2006 [hereinafter "Tr. 5/26/06"] at p. 219, 11. 8-25; tr. 5/25/06, at p. 37, 11. 13-18; p. 38, 11. 1-4.)

On November 19, 2003, the Board furnished Clement with notice, by certified mail, of the complaint filed by B.H. and S.H. On December 1, 2003, Clement transmitted materials to the Board responsive to the complaint. On July 26, 2004, BCBSMT submitted materials to the Screening Panel. An investigator for the Board called Clement and asked for additional information to provide to the Screening Panel. Clement was not given an interview. Clement sent the requested materials on August 22, 2004. Clement was unaware the BCBSMT had already furnished materials to the Screening Panel, because BCBSMT had not responded to an April 2004 letter from Clement requesting more information on some of the findings set forth in a March 2004 letter from BCBSMT to Clement. (*See* Tr. 5/26/06, at pp. 76-80.) The Screening Panel met in September 2004, without permitting Clement to speak. Clement then became aware that the Board possessed information that was being used against her, which she could have refuted with documentation if she had she been given notice of the issues and an opportunity to be heard.

Following the Screening Panel's meeting, the Board asserted twenty-seven facts, with five charges set forth under Mont. Code Ann. § 37-1-316, one charge under § 37-22-301, and six charges under Mont. Admin. R. 24.219.804, the Code of Ethics. False

advertising was listed as a charge under § 37-1-316 and Rule 24.219.804, but the charges were not connected to specific facts, so Clement had no notice of what issues were to be addressed. The charges included an allegation that Clement had billed for counseling services on dates when she provided no such services. Regarding this charge, the record contains testimony from experts in the field of counseling explaining that Clement did provide services on the dates at issue, because a counselor's services can and should be furnished at locations and under circumstances where they are needed by the client. (*See* Tr. 5/26/06, at pp. 211-213.) These services were provided on the occasion when B.H. drove Clement to pick up a car from another person (October 2002); when Clement drove B.H. to a Staples office supply store in Bozeman (July 2002); when Clement took B.H. to a used furniture store to inquire about a used recliner for B.H.'s home (July 2002); and when Clement was working in the same location as B.H., and B.H. approached Clement in Clement's office on a daily basis (October 2002). At each of these times, B.H. demanded that Clement provide counseling, including the development of factual background pertinent to matters directly bearing upon B.H.'s well-being. The Board relied upon B.H.'s allegations which were unsupported by facts. Moreover, all these counseling services were rendered as part of the crisis intervention necessary to enable B.H. and S.H. to cooperate with each other in order to clean up their profoundly untidy house. Such activity by Clement clearly falls within the definition of counseling. Clement strove to satisfy her ethical obligation to provide B.H. with the contact and services necessary to

meet B.H.'s significant needs. It is noteworthy that B.H. had threatened suicide on numerous occasions while under the care of several professionals, including Clement. Clement would have been derelict in her professional duties if she had abandoned B.H. under such circumstances. Clement had nothing in common socially with B.H. or her husband, and Clement possessed no motivation to spend time with S.H. other than to counsel her professionally. Clement billed BCBSMT only for counseling and behavior-modification services provided to B.H. and S.H. No "life support skills" provided by Clement, although beneficial to B.H., were ever billed to the insurer. (Screening Panel Exhibit 1(2), ¶ 4, 11. 1-2; Tr. 5/25/06, at p. 32, 11. 14-24; p. 33, 11.24-25; p. 35, 11. 1-20.) Given B.H.'s diagnosed Borderline Personality Disorder and her manipulative conduct manifesting this condition, Clement was eventually placed in the position of having to distance herself from the patient. Dr. Olson testified that persons with Borderline Personality Disorder are often deceptive and manipulative, and lack credibility. (See Tr. 5/25/06, at p. 209, 1. 12 to p. 211, 1. 22.) Indeed, B.H. repeatedly telephoned Clement after Clement had moved to Tennessee, and had attempted to terminate the professional relationship between the parties.

At the contested-case hearing, the Board narrowed the charges into billing fraud, retaliation/interference with disciplinary process, dual relationships (boundary violations), breach of confidentiality, and misleading advertising. On December 8, 2006, in his Proposed Findings of Fact, Conclusions of Law, and Recommended Order, the

Hearing Officer recommended revocation of Clement's professional license.

Clement filed exceptions and objections, and requested oral argument before the Adjudication Panel of the Board. At the hearing, some Board members expressed their opinions that Clement had properly submitted requests for payment for telephone counseling sessions under a code which BCBSMT would not pay. However, the Board voted to adopt, verbatim, the Proposed Findings of Fact, Conclusions of Law, and Recommended Order. The Board's final order was entered on March 26, 2007. Clement then filed her timely action for judicial review in the District Court.

STATEMENT OF STANDARDS OF REVIEW

Issues I, II, IV, and V address legal conclusions by the district court, and, therefore, are reviewed by this Court de novo. See *Roe Family, L.L.C. v. Lincoln County Board of Commissioners*, 2008 MT 70, ¶ 12, 342 Mont. 108, ___ P.3d ___ (the standard of review of a district court's conclusions of law is whether the court's interpretation of the law is correct). Issue III concerns findings of fact by the district court, and, therefore, is reviewed under the clearly-erroneous standard. 2008 MT 70, ¶ 12. A finding of a district court is clearly erroneous if it is not supported by substantial evidence, if the lower court misapprehended the effect of the evidence, or if a review of the record convinces the Supreme Court that a mistake has been committed. *Id.*

SUMMARY OF THE ARGUMENT

The district court erred in concluding that Clement's constitutional due-process rights were not violated, in light of the governing statutes and the procedure actually afforded to Clement. A statute or regulation is unconstitutionally vague, when it fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. With respect to procedural due process, a person is entitled to notice and an opportunity for an appropriate hearing. In the present case, the statutes and regulations under which Clement's license was revoked failed sufficiently to specify the types of conduct upon which Clement was disciplined. Moreover, Clement's procedural due-process rights were violated because she was deprived of materials necessary for the preparation of her case before the Board.

The district court erred in concluding that Clement committed billing fraud. Clement's contract with BCBSMT could reasonably be interpreted to allow carry-over billing, especially in light of the practice in the Montana social-work community. Moreover, the record establishes that the Homebuilder Model of counseling is not prohibited by Montana professional-counseling standards. The evidence of record indicates that Clement engaged in counseling when needed by B.H. and S.H., and that she believed her billing for such work was proper. Accordingly, the District Court erred in concluding that Clement had committed billing fraud.

The District Court's finding that Clement's use of a dual relationship violated professional standards was clearly erroneous. The record discloses no evidence that the relationship to which the court referred, and upon which Clement was charged with professional misconduct, was ever identified. Moreover, the evidence sustains a finding that dual relationships, in general, can be appropriate in circumstances like those of the present case. For these reasons, the court's finding that Clement engaged in an improper dual relationship has no support in the record, and is clearly erroneous.

The District Court erred in concluding that Clement breached patient-confidentiality standards by counseling her clients in front of third parties. It was the clients' choice to initiate out-of-office counseling. B.H. and S.H. were fully aware of the circumstances under which they requested Clement's services. By asking for Clement to render services under circumstances in which third persons may have been present, the clients waived their right to confidentiality. The lower court committed legal error in finding that Clement breached her duty of confidentiality under the circumstances of this case.

The District Court erred in concluding that representations made on Clement's website constituted false advertising. There is no evidence of any representation on Clement's website that swimming with dolphins is a therapeutic counseling technique. The record indicates that all statements on her website were true, and not misleading to her patients, including B.H. and S.H. Accordingly, the District Court

erred in concluding that Clement's license was correctly revoked based upon materials on her website.

/ ARGUMENT

- I. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLEMENT'S DUE-PROCESS RIGHTS WERE NOT VIOLATED, WHEN THE STATUTES AND REGULATIONS UPON WHICH THE BOARD RELIED IN CHARGING CLEMENT WITH PROFESSIONAL MISCONDUCT AND IN REVOKING HER LICENSE ARE UNCONSTITUTIONALLY VAGUE, AND CLEMENT WAS NOT FURNISHED IN A TIMELY MANNER WITH THE MATERIALS PROVIDED TO THE SCREENING PANEL.**

Clement was charged with violating professional standards set forth in Mont. Code Ann. § 37-1-316. This statute provides, in relevant part:

§ 37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

* * *

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

* * *

(5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

* * *

(9) revealing confidential information obtained as the result of a professional relationship, without the prior consent of the recipient of services, except as authorized or required by law;

* * *

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal

action from being filed, prosecuted, or completed;

* * *

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

Mont. Code Ann. § 37-1-316.

Clement was also charged with violating provisions of the Montana Administrative Code. This rule states, in pertinent part:

24.219.804. CODE OF ETHICS -
LICENSED PROFESSIONAL
COUNSELORS

(1) Pursuant to 37-22-201 and 37-23-103, MCA, the board hereby adopts the following professional and ethical standards for licensed professional counselors and licensed social workers to ensure the ethical, qualified, and professional practice of social work and professional counseling for the protection

of the general public. These standards supplement current applicable statutes and rules of the board. A violation of the following is considered unprofessional conduct as set forth elsewhere in rule and may subject the licensee to such penalties and sanctions provided in 37-1-136, MCA.

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not: (i) commit fraud or misrepresent services performed;

* * *

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

* * *

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

* * *

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information;

* * *

Mt. Admin. R. 24-219.804.

A statute may be challenged as violative of the right to due process based upon its vagueness on two grounds: (1) that the statute is so vague that it is void on its face, or (2) that the statute is vague as applied in a particular situation. *E.g.*, *State v. Turbiville*, 2003 MT 340, ¶ 18, 318 Mont. 451, 457, 81 P.3d 475, 479; *State v. Leeson*, 2003 MT 354, ¶ 11, 319 Mont. 1, 4, 82 P.3d 16, 17. A statute is unconstitutionally vague in violation of due process if a person of common intelligence must guess at its meaning. *Wing v. State ex rel. Dep't of Transportation*, 2007 MT 72, ¶ 12, 336 Mont. 423, 426, 155 P.3d 1224, 1226. In other words, a statute is void for vagueness on its face, if it fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. *Leeson*, 2003 MT 354, ¶ 11; *Montana Supreme Court Commission on Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶ 81, 334 Mont. 311, 332, 147 P.3d 200, 215, *cert. denied*, 127 S. Ct. 1868 (2007); *State v. Allum*, 2005 MT 150, ¶ 31, 327 Mont. 363, 369-70, 114 P.3d 233, 239. In order to avoid being unconstitutionally vague, a statute governing

professional conduct must define the acts which are forbidden. *Montana Supreme Court Commission on Unauthorized Practice of Law*, 2006 MT 284, ¶ 81.

In the present case, virtually the entire support for the District Court's finding that Clement committed billing fraud was the court's determination that Clement had improperly used the Homebuilder Model, and, therefore, had improperly billed for out-of-office counseling. (See App. at 11-13.) However, Clement was never provided with notice as to the identity of the improper dual relationship allegedly created by her use of the Homebuilder Model, in which she had been professionally trained (see tr. 5/25/06, at p. 63, 11. 5-13), or as to which of the relevant statutory and regulatory standards prohibited her use of that model. In other words, the cited provisions provided Clement with no notice of the standard to which her conduct was required to conform. The Board impermissibly reversed the burden of proof, such that, through its failure to identify the allegedly improper dual relationship, the Board required Clement to disprove the allegation that her counseling and billing methods were improper.

Moreover, neither Mont. Code Ann. § 37-1-316 nor Mont. Admin. R. 24-219.804, the provisions under which Clement was charged, defines the term "harm" for purposes of the revocation of the license of a professional counselor. There are no Montana decisions which define harm for such purposes. Mont. Admin. R. 24.219.2305(1)(b), which sets forth the elements of unprofessional conduct for professional counselors, provides that intentionally causing "physical or

emotional harm to a client" is unprofessional conduct. The Board relied upon Mont. Admin. R. 24.219.2305(1)(b) as defining conduct that does not meet the generally accepted standards of practice for purposes of establishing unprofessional conduct by a professional counselor. However, this rule, and the statute allegedly incorporating it, contain a constitutionally insufficient standard by which the acts of professional counselors may be judged.

In the case at bar, the statute and rule upon which the Board has relied in revoking Clement's license for causing harm to B.H. and S.H. are unconstitutionally vague, because they purport to allow the revocation of Clement's license upon evidence which clearly indicates that Clement did no harm to her clients. Hence, Clement was placed into the position at having to guess at the meaning of these provisions. Specifically, the record indicates that Dr. Olson, who saw B.H. following her counseling by Clement, did no new scientific testing or outside evaluation relative to B.H.'s assertion that she "no longer trusted counselors." (See Tr. 5/25/06, at p. 89, 1. 16; p. 190, 11. 18-19.) B.H.'s lack of trust in counselors is not the result of her counseling with Clement. Rather, it is a characteristic of Borderline Personality Disorders, as documented by the following:

1. The Minnesota Multiphasic Personality Inventory-2, performed in the office of Dr. Olsen on October 29, 1999, reported that persons with B.H.'s condition "have difficulty establishing a

treatment relationship because they mistrust other people. The client is so emotionally and socially alienated that it would be difficult for a therapist to gain her confidence." (Petitioner's Exhibit D, p.5, 11.13-15.)

2. The Dismissal Summary from Dr. Olson's commitment of B.H. to Deaconess Billing Clinic for noncompliance with medication orders and out-of-control behavior, probably leading to a manic episode with suicidal ideation on May 11, 2000. In his history of B.H.'s present illness, Dr. Wall reported: "On my interview with her she is quite short and essentially refuses to communicate. The patient denies any active suicidal ideation at present, however, there is ample documentation that this has been an ongoing problem of hers from Dr. Olson" and "there is also a strong odor of alcohol on the patient although she adamantly denies any drinking" (page 3 under mental status evaluation, lines 6-10) (Clement's Exhibit 1 (6), p. 57-65).

3. Testimony of Dr. Hillegass, who saw B.H. in regular, consistent psychotherapy from September 2000 until April 2001, in which she stated: "Complaining and threatening to quit therapy and then calling mid-week with emergencies and demanding to be seen . . . continued to demonstrate . . . generally indicative of borderline personality disorder." (Tr. 8/17/06, p.154, 11. 20-21, 1.25; p. 155, 11. 1-2). (Stopping and then reestablishing counseling is the typical pattern for this type of client and happened on at least three major occasions with Clement as well.)

After treatment by Clement, B.H. has never been hospitalized, has held her job as a cook for the Starwind Ranch for "a little over a year" (Tr. 5/25/06, at p. 88, 1. 9), is amicably separated from her husband with whom she had many crises (*id.* p.87, 11. 12-20), and has taken up residency and become an assistant manager in one of the locations recommended by Clement. (*Id.* at p. 87, 11. 21-25; p. 88, 1.1)

Hence, the Board concluded that Clement caused harm pursuant to a statute and rule that are so impermissibly vague as to allow a finding of harm, despite the foregoing uncontroverted evidence of record that B.H. palpably improved under Clement's treatment. Because the statute and rule allow such a

result, a professional counselor in the position of Clement is reduced to guessing at the meaning of these provisions, and what they proscribe. Accordingly, the Board's decision was made in violation of Clement's due-process rights, and the District Court erred in affirming at decision.

Clement's procedural due-process rights were violated through the manner in which the case was handled by the Board. The requirements for procedural due process are: (1) notice and (2) an opportunity for a hearing appropriate to the nature of the case. *E.g.*, *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 30, 334 Mont. 237, 247, 146 P.3d 759, 767; *see Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 65, 314 Mont. 121, 137, 63 P.3d 1129, 1140 (due process requires both notice of a proposed action, and the opportunity to be heard). The procedural due process which is required in any given case varies according to the circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision. *Montanans for Justice*, 2006 MT 277, ¶ 30. The right to due process requires sufficient advance notice of the evidence which will be presented at a hearing. *Id.*, ¶¶ 32, 33. A party's due-process rights are satisfied when he or she receives notice of the alleged violation, the evidence against the party is disclosed, and the party is afforded the opportunity to present evidence and to cross-examine witnesses. *See State v. Kingery*, 239 Mont. 160, 165, 779 P.2d 495, 498 (1989). Indeed, the APA mandates that, in a contested case, a party be given notice which includes a plain statement of the matters asserted. *See Mont. Code Ann. § 2-4-601(2)(d)*.

Here, Clement was denied her due-process rights of notice and an opportunity to be heard, when the Board permitted BCBSMT to submit voluminous materials regarding Clement without providing Clement an opportunity to review the materials in order to develop her defenses. The Montana Supreme Court has held that a party to screening-panel proceedings possesses a constitutional right to use evidence presented to the screening panel in subsequent proceedings. See *Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981). A screening panel's findings constitute an item of evidence in later proceedings. See *Barrett v. Baird*, 908 P.2d 689 (Nev. 1995).

In the case at bar, the Screening Panel's findings constituted evidence in the hearings before the Hearing Examiner and the Board, as well as on the action for judicial review. However, Clement was deprived of notice and an opportunity to review the materials submitted to the Screening Panel by BCBSMT. As discussed above, Clement had a constitutional right to use the evidence presented to the Screening Panel in subsequent proceedings in this case, a right which she was denied because she was not permitted to review the evidence submitted to the Screening Panel, or to use such evidence to develop her defenses. The Screening Panel's findings, when made, became evidence, but they were evidence from the development of which Clement was wrongfully excluded. The Board's position that Clement was not denied due process because she suffered no deprivation until entry of the final order overlooks the principle, articulated in *Linder*, that evidence presented to a

screening panel is an important part of the licensee's subsequent case in defense to the charges. The fact that Clement may have had time to view the materials before the entry of the final order does not remedy the fact that she was denied the opportunity to discern the manner in which the evidence was characterized when presented to the Screening Panel, knowledge which would have proved eminently important in the preparation of Clement's defense. For these reasons, the Board's decision was made in violation of Clement's constitutional right to due process, and upon unlawful procedure. Accordingly, the District Court erred in affirming the Board's decision. *See* Mont. Code Ann. § 2-4-704(2)(a)(i), (iii).

In addition, the Board's decision violated Clement's constitutional right to procedural due process because the Board raised issues which were not addressed in the proceedings before the Hearing Examiner. For instance, the Board cited the Licensed Professional Counselors Code of Ethics in asserting that Clement violated her ethical obligations by using the Homebuilder Model, even though the Board had approved the use of similar models previously. (*See* Transcript of Proceedings, Full Board Meeting, dated March 2, 2007, at p. 21; Proposed Findings of Fact and Conclusions of Law, at pp. 8, 11-12.) Moreover, nowhere in the proceedings before the Screening Panel, the Hearing Examiner, or the Board was the dual relationship² allegedly created by the use of the

²Although the Board argued, at the October 30, 2007 hearing in this case, that "there's plenty of

Homebuilder Model identified. Dual relationships are not prohibited per se. In fact, the Board has approved their use when they are proved to be therapeutic and are conducted under supervision. Clement was being supervised in her treatment of B.H. and S.H. by Dr. Roger Dale Barnes. (See Tr. 8/17/06, at p. 113, 11. 16-22.)

Finally, the provisions cited by the Department provided Clement with insufficient notice of how her website, created and administered in Tennessee, constituted false advertising in Montana, in light of the evidence that Clement never offered dolphin swims to Montana residents as a counseling technique. For these reasons, Clement's due-process rights to notice and an opportunity to be heard were violated, and the District Court erred in concluding that no violation occurred. Consequently, the court's judgment should be reversed.

references to dual relationships" (see Transcript of Hearing, October 20, 2007, at p. 22, 11.6-15), in fact an examination of the record reveals that nowhere did the Board identify what type of dual relationship, if any, was created by Clement's use of the Homebuilder Model. This fact is crucial, given that the very foundation of the Board's dual-relationship allegation was based upon the use of that specific therapeutic model. For this reason, Clement was actually deprived of notice as to the charge which she was being required to defend.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLEMENT COMMITTED BILLING FRAUD, WHEN THE RECORD ESTABLISHES THAT CLEMENT WAS ADVISED AND BELIEVED THAT CARRY-OVER BILLING WAS APPROPRIATE IN THE COMMUNITY OF LICENSED PROFESSIONAL COUNSELORS IN MONTANA, AND THAT CLEMENT REASONABLY BELIEVED THAT HER USE OF THE HOMEBUILDER MODEL OF PROFESSIONAL COUNSELING, UNDER WHICH PATIENTS MAY BE TREATED OUTSIDE THE CONFINES OF A COUNSELOR'S OFFICE, WAS AN APPROVED THERAPEUTIC METHODOLOGY IN MONTANA.

An insurer is obligated to reimburse a health care provider when the provider contract between the insurer and the provider is silent about the costs of the particular treatment, and the insurer's conduct has suggested that the costs were covered. *See Response Oncology, Inc. v. Blue Cross & Blue Shield of Missouri*, 941 S.W.2d 771, 777 (Mo. Ct. App. 1997).

In the present case, even assuming for the sake of argument that Clement was not entitled to carry over her billing for counseling sessions that, due to the emotional state of the patient and the progress of the

session, necessarily exceeded the seventy-five minutes allotted by BCBSMT's Code 90808, Clement's carry-over billing does not constitute billing fraud in violation of Clement's professional obligations. Mont. Code Ann. § 37-1-316(4) provides that it is unprofessional conduct for a licensee to sign or to issue a document or statement that the licensee knows to contain a false or misleading statement. Similarly, Mont. Admin. R. 24.219.804(2)(a)(i), part of the Code of Ethics for Licensed Professional Counselors, prohibits a licensee from committing fraud or misrepresenting the services performed. Fraud consists of nine elements: (1) a representation, (2) the falsity of that representation, (3) the materiality of the representation, (4) the speaker's knowledge of the representation's falsity or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the representation's falsity, (7) the hearer's reliance upon the truth of the representation, (8) the hearer's right to rely upon the representation, and (9) the hearer's consequent and proximate injury or damages caused by his or her reliance upon the representation. *E.g., In re Estate of Kindsfather*, 2005 MT 51, ¶ 17, 326 Mont. 192, 196, 108 P.3d 487, 490. Here, Clement was not aware of the falsity, if any, of her billing statements for overtime sessions, because her provider contract with BCBSMT was silent as to payment or prohibition against payment for sessions running longer than the period provided by Code 90808. Clement reasonably believed that she could submit invoices for such payment, in light of the absence of any provision addressing such compensation in her

provider contract with BCBSMT. In fact, the record demonstrates that Clement was unfamiliar with insurance billing, given her relative inexperience in the field of counseling at the time of the occurrences at issue. (See Tr. 5/25/06, at p. 69, 11.9-10; Tr. 8/17/06, at p. 148, 11. 5-6; p. 93, 11. 10-15.) If she was incorrect about her contractual right to such payment, she did not commit fraud in submitting bills for overtime sessions.

It has been held that a claim for overtime pay under a contract is permissible, when the contract is silent regarding such pay. See *Spears v. Miller*, 2006 WL 2808145, at *3 (Mass. App. Ct. 2006). Silence in a contract creates an ambiguity when such silence involves a matter naturally within the scope of the contract. See *Public Service Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo 2006). If the language of a contract is silent as to an essential matter, extrinsic evidence may be introduced on the issue. See *Cleary v. News Corp.*, 30 F.3d 1255, 1263 (9th Cir. 1994); *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989). Moreover, when a contract is silent or ambiguous as to a particular term, a court may supply a reasonable term to effectuate the parties' agreement, if the other terms of the contract are clear and definite. *In re Marriage of Eilers*, 205 S.W.3d 637, 645 (Tex. Ct. App. 2006) (review denied).

In the case at bar, Clement's provider contract with BCBSMT was ambiguous as to compensation for overtime sessions, in that the contract failed to address this question. This question constituted an essential matter, the payment of compensation for services

provided to an insured. Hence, extrinsic evidence was admissible to resolve this ambiguity. The record contains substantial evidence that licensed Montana providers customarily engage in carry-over billing to cover time which is not compensable within a single session or treatment. Even assuming that Clement's belief was incorrect, and that she was not entitled to overtime compensation under her provider contract, the issue in these proceedings is not whether Clement misunderstood her contractual rights, but whether she committed billing fraud. Because the provider contract was ambiguous on this crucial point, and in light of the evidence before the Board that, in fact, Montana providers do employ carry-over billing, Clement was unaware of the falsity of her billing statements, and, accordingly, cannot be found guilty of fraud under Montana law. In fact, it would have been unethical for Clement to abandon B.H. and S.H. when the clients were in need of Clement's counseling services, on the basis that Clement believed she was not going to be compensated for her time. (See Tr. 8/17/06, at p. 188, 11. 15-18.) For these reasons, the District Court committed an error of law in concluding that Clement was guilty of billing fraud, and its decision must be reversed.

Moreover, the allegedly improper dual relationship upon which Clement's billing was based was never identified by the Board. (See Tr. 5/25/06, at p. 63, 11. 5-13.) Hence, the Board, and the District Court, reached the legal conclusion that Clement had billed for time not spent in counseling without the required factual foundation that she did not actually provide counseling during the out-of-office occasions at

issue. For this reason as well, the District Court's decision was erroneous, and its judgment should be reversed.

III. THE DISTRICT COURT'S FINDING THAT CLEMENT'S USE OF A DUAL RELATIONSHIP VIOLATED PROFESSIONAL STANDARDS WAS CLEARLY ERRONEOUS, WHEN THERE WAS NO EVIDENCE IN THE RECORD IDENTIFYING THE RELATIONSHIP TO WHICH THE COURT REFERRED AND UPON WHICH CLEMENT WAS CHARGED WITH PROFESSIONAL MISCONDUCT, AND THE RECORD ESTABLISHED THAT DUAL RELATIONSHIPS, IN GENERAL, CAN BE APPROPRIATE IN CIRCUMSTANCES LIKE THOSE OF THE PRESENT CASE.

As discussed above, the administrative record is devoid of any evidence that the Board identified the improper dual relationship allegedly created by the use of the Homebuilder Model. This fact is crucial, given that the very foundation of the Board's dual-relationship allegation was based upon the use of that specific therapeutic model. The District Court could not properly find as a fact that Clement was guilty of a dual-relationship violation, when the facts of record contain no evidence that an inappropriate dual relationship even existed.

In fact, the standards applicable to clinical professional counseling recognize that dual relationships can be appropriate under certain circumstances, for example, when there is no sexual relationship involved. The Board offered no proof either that the Homebuilder Model created a prohibited dual relationship, or that the Homebuilder Model is ineffective. In this regard, it is highly significant that the Board did not proffer an expert witness who could speak to the alleged deficiencies of, or any advantages of, the Homebuilder Model. In fact, the record establishes that Homebuilder Model is used by numerous Montana counselors. (See Tr. 5/26/06, at p. 200, 11. 6-14.)

For all these reasons, the District Court's finding that Clement's use of the Homebuilder Model violated applicable professional standards is clearly erroneous. Accordingly, the District Court's judgment should be reversed.

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLEMENT BREACHED HER PROFESSIONAL O B L I G A T I O N O F CONFIDENTIALITY, WHEN THE RECORD ESTABLISHES THAT THE PATIENT AT ISSUE DID NOT RECEIVE COUNSELING IN FRONT OF THIRD PARTIES, THE PATIENT HERSELF CHOSE TO RECEIVE COUNSELING OUTSIDE CLEMENT'S OFFICE SETTING, AND THE LAW PROVIDES THAT A

**PATIENT MAY WAIVE HIS OR HER
RIGHT TO CONFIDENTIALITY BY
ALLOWING OTHERWISE
PRIVILEGED INFORMATION TO
BECOME KNOWN OUTSIDE THE
COUNSELING RELATIONSHIP.**

Mont. Code Ann. § 37-1-316(9) prohibits a professional licensee from "revealing confidential information obtained as a result of a professional relationship without the prior consent of the recipient of the services, except as authorized or required by law." The very statute cited by the District Court in support of its decision provides an exception to the general rule of confidentiality "to the extent that the privilege is otherwise waived by the client." Mont. Code Ann. § 37-22-401(5).

The confidentiality of communications between a patient and his or her counselor can be waived like any other privilege. *See State ex rel. Mapes v. District Court of the Eighth Judicial District in and for County of Cascade*, 250 Mont. 524, 531, 822 P.2d 91, 94 (1991). In a setting subject to a professional duty of confidentiality, information must be rendered in confidence in order to be confidential. *See State ex rel. Union Oil Co. v. California v. District Court of Eighth Judicial District in and for Cascade County*, 160 Mont. 229, 503 P.2d 1008 (1972); *United States v. Martin*, 278 F.3d 988 (9th Cir. 2002).

In the case at bar, the record is devoid of evidence that Clement rendered counseling services to B.H. or S.H. in the presence of third parties, so as to

risk a breach of client confidentiality. However, even assuming for the sake of argument that counseling did occur under such circumstances, *it was the sole choice of B.H.* to seek counseling in situations where third parties might have been in a position to overhear conversations between B.H. and Clement. There is no duty on the part of a professional licensee to demand that a client receive services under circumstances where confidentiality can be assured, and to refuse to provide services, against the client's will, where confidentiality cannot be fully guaranteed. B.H. was aware of the out-of-office circumstances under which she requested counseling, and knew that such circumstances might not allow all of her statements to be made in confidence. For these reasons, to the extent that third parties overheard any out-of-office counseling between B.H. and Clement, Clement breached no duty of confidentiality to B.H. ³ The District Court erred in concluding that Clement breached her professional duty of confidentiality, and its judgment should be reversed.

V. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLEMENT BREACHED HER PROFESSIONAL OBLIGATIONS WITH RESPECT TO THE REPRESENTATIONS MADE ON

³It is also noteworthy that BCBSMT took the position that no counseling occurred, and that, as a result, fees had to be returned, while the Board took the opposite position that Clement breached her duty of confidentiality because counseling did occur.

**HER WEBSITE, WHEN THE BOARD
FAILED TO PROVE THAT ANY
REPRESENTATIONS WERE FALSE
OR MISLEADING.**

The Montana Code of Ethics for licensed professional counselors prohibits licensees from engaging "in any advertising which is in any way fraudulent, false deceptive, or misleading." Mont. Admin. R. 24.219.804(2)(a)(ix). With respect to a website, advertising is deceptive when a substantial portion of the intended audience was either deceived or tended to be deceived by the advertisement. *E.g., Interactive Products Corp. v. a2z Mobile Office Solutions, Inc.*, 195 F. Supp. 2d 1024 (S.D. Ohio 2001), *aff'd*, 326 F.3d 687 (6th Cir. 2003).

In the case at bar, the record is devoid of any evidence that Clement's website advertising included a claim that swimming with dolphins is a "therapeutic technique used in professional counseling." In fact, the record demonstrates that Clement never offered dolphin swims as a counseling technique. (See Board's Exhibit 5(C).) Even assuming that the website stated that swimming with dolphins is "therapeutic", no reasonable person would conclude this statement offers a specific type of professional counseling. In fact, many persons may find the statement to be true. The record is clearly insufficient to support a conclusion that the statement about dolphins deceived or tended to deceive a substantial portion of the intended audience. Accordingly, there is no basis upon which the District Court could correctly have concluded that the statement on Clement's website constituted false

advertising in violation of Mont. Admin. R. 24.219.804(2)(a)(ix).

In addition, the Court's conclusion is based upon the erroneous assumption that Clement's Montana counseling license controlled Clement's entire website. In fact, the process for promulgation of the rule upon which the Board relied for its false-advertising charge was not commenced until August 2003, *after* the events at issue had occurred. For this additional reason, Clement was not guilty of false advertising, and the District Court's judgment should be reversed.

CONCLUSION

For all the foregoing reasons, the Petitioner-Appellant, Mary J. Clement, respectfully requests that this Honorable Court reverse the judgment of the District Court, and reinstate her license as a professional counselor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionally spaced, Times New Roman typeface, 14-point type. This brief contains 7,513 words, as registered by the word

processing system used to prepare the brief.

Mary J. Clement

APPENDIX

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing brief upon all parties by depositing a copy of the same in the United States mail, postage prepaid, addressed as follows:

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This the day of April, 2008.

Mary J. Clement

NO. DA 08-0077

**MARY J. CLEMENT,
Petitioner-Appellant,**

vs.

**STATE OF MONTANA, DEPARTMENT OF
LABOR AND INDUSTRY, BOARD OF SOCIAL
WORK EXAMINERS AND PROFESSIONAL
COUNSELORS,**

Respondents-Appellees

**APPEAL FROM MONTANA FIRST JUDICIAL
DISTRICT COURT
LEWIS AND CLARK COUNTY
HONORABLE JEFFREY M. SHERLOCK, D.C.J**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE BOARD HAS MISIDENTIFIED THE STANDARDS OF REVIEW APPLIED BY THIS COURT.

In its brief, the Board argues that standard of appellate review of legal questions determined by the district court on judicial review of an administrative decision is the abuse-of-discretion standard. (See Brief of Respondents-Appellees at 6.) This is incorrect. As Clement pointed out in her opening brief, a district court's legal conclusions are reviewed de novo by the Supreme Court. See *Roe Family, L.L.C. v. Lincoln County Board of Commissioners*, 2008 MT 70, ¶ 12, 342 Mont. 108, 111, 179 P.3d 514, 517 (2008). This standard of review applies equally on appellate review of a district court's judgment on judicial review of an administrative decision. The Supreme Court applies the same standards as the district court when reviewing a district-court order affirming or reversing an administrative decision, such that the Supreme Court determines whether the agency's findings of fact are clearly erroneous, and whether the agency correctly interpreted the law. *Frontier Chevrolet v. Department of Revenue*, 2008 MT 191, ¶ 8, ___ Mont. ___, ___ P.3d ___, 2008 WL 2265291, at *2 (not yet released for publication).

In the case at bar, the application of the abuse-of-discretion standard to issues I, II, IV, and V in Clement's opening brief would risk an erroneous decision on these questions, because they involve the legal conclusions of the district court and the Board. As

the foregoing authority makes clear, these issues are properly considered by this Court under the *de novo* standard of review. As discussed below, the application of this standard to these issues results in the conclusion that the district court and the Board committed errors which require reversal of the decision to revoke Clement's license.

II. THE STATUTES AND REGULATIONS UPON WHICH THE BOARD REVOKED CLEMENT'S LICENSE ARE UNCONSTITUTIONALLY VAGUE.

In its brief, the Board argues that Mont. Code Ann. § 37-1-316(18), Mont. Admin. R. 24.219.2305(1)(b) and (f), and Mont. Admin. R. 24.219.804, considered together, adequately notify a person of common intelligence that the use of the Homebuilder Model of professional counseling, which may result in a dual relationship with a client, is forbidden. (Brief of Respondents-Appellees at 8, 11). An examination of these provisions reveals that this argument is incorrect.

Mont. Code. Ann. § 37-1-316(18) provides:

§ 37-1-316. Unprofessional conduct

The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

* * *

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

Mont. Code Ann. § 37-1-316.

The Board concedes that § 37-1-316(18) "does not present a perfectly precise list" of conduct that is prohibited for a professional licensee like Clement. (Brief of Respondents-Appellees at 9.) The Board insists, however, that, despite its lack of specificity, the type of conduct to which § 37-1-316(18) is meant to apply is made clear by two administrative rules applicable to professional counselors. It is clear, however, that these rules suffer from the same vagueness as the statute with respect to the conduct at issue in this case.

The portion of Mont. Admin. R. 24.219.2305 cited by the Board provides:

**24.219.2305. UNPROFESSIONAL,
CONDUCT FOR PROFESSIONAL
COUNSELORS**

(1) Violation of any of the following constitutes unprofessional conduct:

* * *

(b) Intentionally cause physical or emotional harm to a client.

* * *

(f) Perform or hold himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training and/or experience.

* * *

Mont. Admin. R. 21.219.2305.

The other rule cited by the Board is Mont. Admin. R. 24.219.804. In its brief, the Board does not identify which portion of this rule "limits" the generalized language of Mont. Code Ann. § 37-1-316(18) sufficiently with respect to the conduct at issue in this case. This rule provides in full:

24.219.804. CODE OF ETHICS -
LICENSED PROFESSIONAL
COUNSELORS

(1) Pursuant to 37-22-201 and 37-23-103, MCA, the board hereby adopts the following professional and ethical standards for licensed professional counselors and licensed social workers to ensure the ethical, qualified, and

professional practice of social work and professional counseling for the protection of the general public. These standards supplement current applicable statutes and rules of the board. A violation of the following is considered unprofessional conduct as set forth elsewhere in rule and may subject the licensee to such penalties and sanctions provided in 37-1-136, MCA.

(2) A licensed professional counselor or licensed social worker shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

(ii) divide a fee or accept or give anything of value for receiving or making a referral;

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

(iv) exploit in any manner the professional relationships with clients or former clients, supervisees, supervisors, students, employees, or research participants;

(v) engage in or solicit sexual relations with a client, or commit an act of sexual misconduct or a sexual offense if such act, offense or solicitation is substantially related to the qualifications, functions, or duties of the licensee;

(vi) condone or engage in sexual harassment. Sexual harassment is defined as deliberate or refuted comments, gestures, or physical contact of a sexual nature that are unwelcome by the recipient;

(vii) discriminate in the provision of services on the basis of race, creed, religion, color, sex, physical or mental disability, marital status, age or national origin;

(viii) provide professional services while under the influence of alcohol or other mind altering or mood altering drugs which impair delivery of services; or

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the

extent and nature of the services available to them;

(ii) terminate services and professional relationships with clients when such services and relationships are no longer required or where a conflict of interest exists;

(iii) make every effort to keep scheduled appointments;

(iv) notify clients promptly and seek the transfer, referral, or continuation of services pursuant to the client's needs and preferences if termination or interruption of services is anticipated;

(v) attempt to make appropriate referrals pursuant to the client's needs;

(vi) obtain informed written consent of the client or the client's legal guardian prior to the client's involvement in any research project of the licensee that might identify the client or place them at risk;

(vii) obtain informed written consent of the client or the client's legal guardian prior to taping, recording, or permitting third party observation of the client's activities that might identify the client or place them at risk;

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information; and

(ix) disclose to and obtain written acknowledgement from the client or prospective client as to the fee to be charged for professional services and/or the basis upon which the fee will be calculated.

Mont. Admin. R. 24.219.804.

It is evident that Rule 24.219.2305 is no more specific than Mont. Code Ann. § 37-1-316(18) in providing notice to a professional counselor that the use of the Homebuilder Model or a dual relationship is prohibited. Although Rule 24.219.804 is more verbose, this provision also lacks any language which could serve as notice to a reasonable person that the use of the Homebuilder Model or a dual relationship in professional counseling is prohibited conduct on the part of a licensee. Hence, the Board's best argument, that the vagueness of Mont. Code Ann. § 37-1-316(18) is "limited" by the cited regulations, is wholly unavailing.

The Board also takes issue with Clement's position that the failure to define the term "harm" in Rule 24.219.2305(1)(b) renders the rule unconstitutionally vague. In so doing, the Board ironically opines that "harm does not require

diminution of quality of life." (Brief of Respondents-Appellees at 15.) If, against all commonly understood meanings of the word, the definition of "harm", for purposes of the rule, does not require even the slightest diminution in the quality of life, the point is established that the rule is so vague that it is incapable of furnishing notice to a person of common intelligence that the type of conduct in which Clement engaged, using the Homebuilder Model of professional counseling, is forbidden. *See Carpetta v. The Pi Kappa Alpha Fraternity*, 718 N.E.2d 1007, 1017 (Ohio Com. Pl. 1998) (phrase "mental harm" as used in statute was too unclear and imprecise to afford notice of prohibited conduct, even though statute limited such harm to conduct creating a substantial risk of causing mental or physical harm to any person).

For all these reasons, the statutes and regulations upon which the Board relied in charging Clement with professional misconduct and revoking her license are unconstitutionally vague, and the Board and district court committed an error of law in concluding that Clement's professional license could properly be revoked upon them.

III. CLEMENT'S PROCEDURAL DUE-PROCESS RIGHTS WERE VIOLATED BY THE BOARD'S REFUSAL TO ALLOW CLEMENT TO REVIEW THE RELEVANT MATERIALS BEFORE THE SCREENING PANEL MADE ITS RECOMMENDATION TO INITIATE REVOCATION PROCEEDINGS.

The Board argues in its brief that no due-process violation occurred from the denial of Clement's request to examine the materials upon which the Screening Panel was going to rely in making its recommendation about further proceedings, because Clement "faced no real risk of deprivation of her license at the time her case was reviewed by the Screening Panel." (Brief of Respondents-Appellees at 17.) According to the Board, the fact that these materials were eventually furnished to Clement was sufficient to meet the requirements of due process.

The Board's argument is incorrect for the reasons discussed in Clement's opening brief. Under Montana law, a party to screening-panel proceedings has a constitutional right to use evidence presented to the screening panel in later proceedings. *See Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981). Because a screening panel's findings become evidence in licensure proceedings, *see Barrett v. Baird*, 908 P.2d 689, 695 (Nev. 1995), a refusal to furnish to a licensee the materials upon which the screening panel is relying in making its determinations risks an immediate, adverse effect on the licensee's ability to mount an ultimately successful defense.

For these reasons, the Board and the district court erred in concluding that Clement's procedural due-process rights were adequately protected in light of the Board's refusal to provide the Screening-Panel materials in a timely manner, and the decision below should be reversed.

IV. THE BOARD AND THE DISTRICT COURT COMMITTED LEGAL ERROR IN CONCLUDING THAT CLEMENT WAS GUILTY OF BILLING FRAUD, WHEN THE PROVIDER CONTRACT AT ISSUE COULD REASONABLY BE INTERPRETED TO ALLOW BOTH CARRY-OVER BILLING AND COMPENSATION FOR OUT-OF-OFFICE COUNSELING.

The Board relies upon Mont. Code Ann. § 37-1-316(4) and (5) and the related rules to support its position that Clement committed billing fraud by charging BCBSMT for counseling sessions that exceeded BCBSMT's seventy-five minute Code 90808, and by billing for counseling sessions with B.H. which occurred outside an office setting. Clement has demonstrated in her opening brief that her provider contract with BCBSMT was wholly silent on the issue of overtime compensation, and that she was informed that the custom in the Montana professional-counseling community permitted carry-over billing. The record also demonstrates that the Homebuilder Model, which allows counseling to take place in nontraditional settings provided that counseling is needed by the client and is in the client's best interests, is generally accepted in the professional-counseling community, and is not prohibited by Montana law. As Clement has pointed out in her initial brief, Montana law requires, as an element of fraud, that the person allegedly committing the fraud both know of the falsity of a representation

and intend that the other party act upon the false representation. Neither of these elements is satisfied by the evidence of record.

In its brief, the Board provides two "examples" of Clement's activities with B.H. presumably intended to prove that Clement was guilty of billing fraud. (See Brief of Respondents-Appellees at 20.) Both of these occurrences involved counseling sessions which took place outside Clement's office. As discussed heretofore, the record contains testimony establishing that it is an approved professional methodology to counsel clients in need of services outside the confines of the counselor's office. B.H. was such a client. B.H. was suicidal when she first employed Clement's services, and Clement's professional duties occasionally required her to provide nontraditional counseling to B.H. The instances to which the Board refers in its brief, and the other occasions of counseling mentioned by Clement in her opening brief, were necessitated by B.H.'s substantial needs. Indeed, as Clement has pointed out in her opening brief, B.H. improved markedly under Clement's treatment, and emerged from such treatment employable and no longer suicidal. (See Tr. 5/25/06, at p. 88, l. 1, 9; p.87, ll. 12-25.)

For all these reasons, the Board and the district court committed legal error in concluding that Clement was guilty of billing fraud under the law of Montana, and the decision to revoke Clement's license must be reversed.

**V. THE NOTICE OF THE CHARGES
AGAINST CLEMENT DID NOT
SATISFY THE REQUIREMENTS OF
PROCEDURAL DUE PROCESS.**

In her opening brief, Clement notes that the requirements of procedural due process are (1) notice and (2) an opportunity for a hearing appropriate to the nature of the case. *E.g., Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 30, 334 Mont. 237, 247, 146 P.3d 759, 767. Despite the fact that the record is devoid of any evidence that Clement was provided notice that the charges against her were based upon her allegedly unlawful use of the Homebuilder Model, with its associated out-of-office billing, and that virtually the Board's entire case against her was based upon such conduct, the Board now takes the position that it owed Clement no more process than it provided because Clement did not "ask the Department to identify the relationship upon which she was charged with professional misconduct." (Brief of Respondents-Appellees at 25.)

The Board's suggestion that it was Clement's burden to ask for fair notice of the charges turns on its head all traditional requirements of procedural due-process, which place upon the charging party the onus of providing fair notice of the items against which the charged party must prepare himself or herself to defend. *See Montanans for Justice*, 146 P.3d at 767. Indeed, the Board cites no authority for its troubling proposition. (*See* Brief of Respondents-Appellees at 25.) Under the Board's view of the notice required by due process, an administrative agency can haul a licensee

in on generalized disciplinary or revocation charges, engage in a fishing expedition to develop the evidence and to decide whether the initial charges were actually justified, and then, if they were, proceed to discipline or to disqualify the licensee. How such a procedure places the licensee at a fatal disadvantage in developing a defense is obvious. The litany of facts recited by the Board in its brief (*see* Brief of Respondents-Appellees at 22-23) as somehow sufficient to notify Clement that she was being charged with using an unlawful model of professional counseling, a model which has been specifically approved in other jurisdictions and never disapproved in Montana, does nothing to demonstrate how such facts, not charges, notified Clement that her entire theory of professional counseling, which included the potential for out-of-office counseling and billing, was the basis of the Board's attack. Under the notice provided, Clement had no idea, until it was too late, that the thrust of her defense should address the propriety of her model of counseling, and not just the evidence proffered by the Board as to individual counseling sessions with B.H.

For all the foregoing reasons, the notice provided by the Board did not satisfy the dictates of procedural due process. Consequently, the decision below should be reversed.

VI. THE FINDING BY THE BOARD AND THE DISTRICT COURT THAT CLEMENT ENGAGED IN A PROHIBITED DUAL RELATIONSHIP WAS CLEARLY ERRONEOUS.

The Board also argues, separately from the question of whether its notice to Clement—which omitted any reference to the Homebuilder Model or the fact that Clement's very model of professional counseling would be challenged—met the requirements of procedural due process, that the Board and the district court correctly determined that Clement engaged in an improper dual relationship with B.H. (See Brief of Respondents-Appellees at 26.) Although conceding that use by a professional counselor of the Homebuilder Model might be appropriate under some circumstances (see Brief of Respondents-Appellees at 26), the Board argues that, in this case, the hearing examiner and the district court correctly found Clement's use of that model to be inappropriate in her counseling of B.H.. The Board does not explain, however, how the material it cites from the administrative hearing sustains this conclusion. (See Brief of Respondents-Appellees at 27.) Moreover, it does not explain how, after acknowledging that a dual relationship like the Homebuilder Model might be appropriate in some situations, the fact that "Clement knew that she was in a dual relationship with B.H." supports a conclusion that Clement acted improperly. (Brief of Respondents-Appellees at 27.) In sum, the Board's *post hoc* reexamination of the record for evidence of wrongdoing in Clement's choice of treatment model has located nothing which provides more than the slightest support, and certainly not substantial evidence, for the conclusion that Clement engaged in a dual relationship which was harmful to B.H. Given that the Board acknowledges that a dual relationship can be proper under some circumstances, one of those circumstances is surely when

demonstrable improvement to the client can be established. As discussed above, B.H. achieved such improvement under Clement's treatment. (See Tr. 5/25/06, at p. 88, 1. 1, 9; p.87, 11. 12-25.)

For these reasons, contrary to the Board's argument, there was not substantial evidence to support the conclusion that Clement engaged in an inappropriate dual relationship with B.H. Therefore, the Board's and the district court's decision revoking Clement's license must be reversed.

**VII. THE BOARD AND DISTRICT COURT
ERRED IN CONCLUDING THAT
CLEMENT BREACHED HER
PROFESSIONAL OBLIGATION OF
CONFIDENTIALITY.**

As Clement has pointed out in her opening brief, there is no doubt under Montana law that the client of a professional counselor can waive his or her right of confidentiality:

**§ 37-23-301. Privileged
communications—exceptions**

A licensee may not disclose any information he acquires from clients consulting him in his professional capacity except:

- (1) with the written consent of the client or, in the case of the client's death or mental incapacity, with the written

consent of the client's personal representative or guardian;

(2) that he need not treat as confidential a communication otherwise confidential that reveals the contemplation of a crime by the client or any other person or that in his professional opinion reveals a threat of imminent harm to the client or others;

(3) that if the client is a minor and information acquired by the licensee indicates that the client was the victim of a crime, the licensee may be required to testify fully in relation thereto in any investigation, trial, or other legal proceeding in which the commission of such crime is the subject of inquiry;

(4) that if the client or his personal representative or guardian brings an action against a licensee for a claim arising out of the counselor-client relationship, the client is considered to have waived any privilege;

(5) *to the extent that the privilege is otherwise waived by the client; and*

(6) as may otherwise be required by law.

Mont. Code Ann. § 37-23-301. (Emphasis added.)

Indeed, as Clement has explained, Montana case law specifically cognizes that a patient may waive the right of confidentiality with respect to his or her counselor. *See State ex rel. Mapes v. District Court of the Eighth Judicial District in and for County of Cascade*, 250 Mont. 524, 531, 822 P.2d 91, 94 (1991). Contrary to the suggestion of the Board, Mont. Code Ann. § 37-23-301(5) makes clear that such a waiver is not limited "to the admission of evidence." (Brief of Respondents-Appellees at 28.) Because B.H. was fully aware of the presence of third parties while she was being counseled by Clement, and made the choice herself to continue such counseling, she waived her right to confidentiality provided by Montana law to clients of professional counselors. Accordingly, the Board and the district court erred in concluding that Clement breached her professional duty of confidentiality.

VIII. THE BOARD AND THE DISTRICT COURT COMMITTED LEGAL ERROR IN CONCLUDING THAT THE REPRESENTATIONS ON CLEMENT'S WEBSITE CONSTITUTED FALSE, FRAUDULENT, OR DECEPTIVE ADVERTISING.

As Clement has observed in her opening brief, her website contained no statement that swimming with dolphins was a technique offered by Clement as part of her professional-counseling services. Contrary to the Board's argument, there is absolutely no evidence in the record to support the conclusion that

Clement offered dolphin swims "in connection with professional counseling." (Brief of Respondents-Appellees at 29.) The "depiction" cited by the Board from Clement's website was, by the Board's own admission, "connected" with group activities offered by Clement as "additional healing experiences." (Brief of Respondents-Appellees at 29.) The facts that such an experience was specifically designated as "additional" to, i.e., separate from, the actual counseling activities mentioned on the website, and that the website included only a photograph of swimming dolphins and not any verbal assertion that swimming with dolphins is a therapeutic technique employed in professional counseling, establish conclusively and as a matter of law that Clement's website did not constitute false or fraudulent advertising in violation of the Montana Code of Ethics for licensed professional counselors.

For these reasons, the Board and the district court erred in concluding that Clement was guilty of false, fraudulent, or deceptive advertising in connection with her practice of professional counseling. Accordingly, the decision below must be reversed.

CONCLUSION

For all the foregoing reasons, the Petitioner-Appellant, Mary J. Clement, respectfully renews her request that this Honorable Court reverse the judgment of the District Court, and reinstate her license as a professional counselor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing reply brief is proportionally spaced, Times New Roman typeface, 14-point type. This brief contains 3,737 words, as registered by the word-processing system used to prepare the brief.

Mary J. Clement

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing reply brief upon all parties by depositing a copy of the same in the United States mail, postage prepaid, addressed as follows:

Don E. Harris, Esquire
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This the day of June 2008.

Mary J. Clement

[TR. OF HEARING BEFORE BOARD OF SOCIAL
WORK EXAMINERS AND PROFESSIONAL
COUNSELORS, AUG. 17 and 18, 2006, pp. 13-20]

[Page 13]

A Yeah, our medical review staff is who I approached.

Q Okay.

A Yeah, they're the folks that gave me the information.

Q Okay.

A And they would be the folks that would be doing any reviews on the 22 modifier.

Q Right. My understanding from your job was that you were supposed to help providers like me bridge the gap into the insurance company; that was your job?

A One of the responsibilities, yes.

Q So that when I didn't understand something, your job was to help educate me?

A Correct.

Q And so one of the issues we were having, and the client explained it to you, was that she had serious issues from childhood and we needed that time to go over?

MS. SCHNEIDER: Objection again,
stating facts not in evidence.

HEARING OFFICER HANCHETT: O k a y .
The way she's asking that question, yeah, rephrase it.

BY MS. CLEMENT:

Q Do you remember her telling you that one
of the reasons she was going overtime was that she
had serious [Page 14] issues with childhood and
painful experiences?

A Yes.

Q Okay. So you became aware that there
was a need here and that's why you decided to help us;
right?

HEARING OFFICER HANCHETT: I'm only
going to allow that for the purpose of what he did
because I don't believe you're trying to qualify him as
an expert in sociology --

MS. CLEMENT: No, no, no.

HEARING OFFICER HANCHETT: - - o r
psychology to say whether there's a need or not or are
you trying to do that?

MS. CLEMENT: No, I'm not. I'm just trying
to get the role that he was playing for us because the
two of us were coming saying we don't understand
what's going on.

HEARING OFFICER HANCHETT: Okay.
And I understand that. But that's not the way you asked that question. You asked him for ostensibly expert testimony which I don't think you're trying to do.

THE WITNESS: No.

MS. CLEMENT: No.

THE WITNESS: And the reason I would help any provider is because that's what I do. I wouldn't look at your client, as an example, in that situation and say oh, yes, definitely she has a need and then go seek out, you know -- what I would do is since my relationship is with you and you're a provider; you have the need.

[Page 15]

BY MS. CLEMENT:

Q Right, okay.

A So I'd approach Blue Cross Blue Shield.

Q Okay. Now explain to the Court what a 22 modifier is?

A Again, not being expert on the modifier but 22 modifier is a modifier you can attach to a claim or a code that would help increase the allowance. Basically saying, you know, there were maybe some special circumstances and you're asking for an additional allowance.

Q Of time; right?

A It can be used for -- it's not necessarily time. It can be used in other does not just on 90808. It can be used on other codes to where it would increase the allowance by 20 percent.

Q Oh, I didn't know that.

A Yeah.

Q Thank you. But wasn't and isn't the 22 modifier accepted by the American Medical Association?

A It's a national -- it's a national code, yes. I don't have any experience as far as where it comes from I just know that it's --

Q -- used nationally?

A It's accepted by Blue Cross Blue Shield as a modifier, yes.

[Page 16]

Q Okay. But didn't we get the feeling -- I'm sorry I use social work terms every once in a while. Wasn't the difficulty here was that the 22 modifier wasn't accepted by Blue Cross and Blue Shield, and I was -- I came from a place in Tennessee where we had used it extensively. And that was some of the difficulty we were having was how to bridge this gap?

A The 22 modifier at that time in 2001 was something fairly new that we had started accepting. It wasn't -- I wouldn't quantify that as you and I bridging that gap because the 22 modifier at that point had been accepted but it wasn't very widely used in Montana.

Q Okay. Did Blue Cross Blue Shield provide any other way for a provider to handle overtime with clients?

A You know, from a coding perspective, no. Any provider that, you know, wanted additional allowances for their services could write into Blue Cross, send in records and we could review that.

Q But it was after the fact?

A It could be done before or after the fact. It could be done in advance of the services.

HEARING OFFICER HANCHETT: So you're saying you would pre-authorize?

THE WITNESS: That's exactly what it was called, yes, pre-authorization.

[Page 17]

BY MS. CLEMENT:

Q Did you tell me that?

A I don't know if we discussed that; I don't recall.

Q No. Does Blue Cross and Blue Shield permit the client then to pay for her own overtime when she goes over -- he or she goes over?

A If it's a contracted provider --

Q Uh-huh?

A -- it would be the patient would be responsible for anything that would be considered to be a non-covered service. In your example with the 90808, if you billed for something over that 90808, being a contracted provider, you would be responsible to write that amount off because it wouldn't be denied as a non-covered service.

Q Okay. Was there any other providers who were calling you and talking to you about having clients that went overtime and were 22 modifiers or was I the --

A I do know that you were probably the first in the behavioral health speciality but I don't recall. I mean I've had some in the past.

Q But I was the first?

A I think you were probably the first that I had dealt with, yes.

Q Okay. Do you -- is there any written or express provision provided by Blue Cross Blue Shield to the [Page 18] provider that combining times from one session to another is prohibited?

A I'm not sure I understand what you mean.

Q If a client goes over session 20 minutes and the counselor takes that 20 minutes and puts it to the next session, in the common usage and trade they call it carry over. Is there any written or express provision that says that that carry over is prohibited?

MS. SCHNEIDER: Objection, asked and answered.

HEARING OFFICER HANCHETT:
Overruled.

THE WITNESS: I don't think I could identify specifically where it is. There's the policy that we have that you bill for the services specifically at the time of the service.

BY MS. CLEMENT:

Q Okay.

A So if it's on a Monday, you bill for everything on the Monday. You can't bill it in advance or after that.

Q Right. But is that policy written?

A I would expect that it is but I'm not the expert on the policy so I don't know where I would find it.

Q But you didn't share that with me; you didn't give me that information?

A No, we didn't talk about carry over.

Q Okay. Some insurance companies actually have a [Page 19] sheet and on that sheet they say they only allow two sessions per week. They say you only can have so many hours. You can only use a 90806 or we really frown on using 90808. Was there anything clearly written for providers at that time that you could give a provider and say?

A It would have been in our medical policy. We have a medical policy that covers everything that we allow and everything that we don't allow. So if the 90808 -- if there was a question about whether 90808 was covered, I could look up in our medical policy and it would tell me that it was or was not covered.

Q Isn't one of the reasons why you're not able to give a sheet of paper to a provider on some of these policies is that it varies from contract to contract?

A Our medical policy is pretty much widespread and we can share the medical policy with providers but you are correct that some contracts, you know, if they're maybe a self administered or self funded group, they may have their own specific policy. Maybe an example, like you said, maybe they only allow two sessions per week. Blue Cross Blue Shield doesn't -- that's not within our policy but you might

have a group out there that would limit their own employees to two sessions a week.

Q Okay. But one of the problems we're having is [Page 20] that when I went onto a 100 percent review and I put some documents in, I found out that there were some more rules that were never shared with me even when I asked for, you know, when I called in. What I'm asking is is this information that you're talking about, the medical policy, was that to your knowledge ever provided to me?

A I don't recall if we ever gave you the medical policy.

Q Okay.

A I would say probably not.

Q It looks like from what you're giving in your testimony that I was one of the first ones questioning the 22 modifier, the use of the 22 modifier?

A Correct.

Q And then you said that it seems like now you've put a system in process to deal with 22 modifiers. You mentioned medical review or medical something?

A Yeah, and this was even back at that time when we first started talking about the 22 modifier. That a medical review staff, if a 22 modifier is billed on a claim, then our review staff would be looking at that

claim and would need records to substantiate an increase in the allowance.

[TR. OF PROCEEDINGS (DAY I) BEFORE BOARD
OF SOCIAL WORKERS AND PROFESSIONAL
COUNSELORS, MAY 25, 2006, pp. 37-40]

[Page 37]

Q Now, is it your testimony that that is automatic, if you put that on the claim form you're supposed to be paid for the extra 20 minutes or whatever it is?

A It can be, in some places it is and some places they ask you to five more documentation and so you submit the documentation in terms of the progress notes.

Q And so do you have any idea percentage-wise how often you were using the 90808 maximum amount of allowable time for counseling the Hopkinses with the 22 modifier added to it?

A I didn't use a 22 modifier with them because what happened was in the beginning when I had tried to use the 22 modifier and sent in the documentation they said, they wrote back and said "We only permit the 22 modifier to be used when a person lives in a rural area." In other words, the weren't giving a medical reason as to the necessity that I felt was there and then I realized that what they were doing was telling me that I couldn't use it but not telling me how I could use it, and then I realized that what was happening here in the state of Montana is counselors weren't using it and they had gone -- when I went to a training session I [Page 38] asked what was

going on with this 22 modifier and why it wasn't being used and some counselors came up to me afterwards and said, "You don't get paid under a 22, what you do is your do carryover."

MS. SCHNEIDER Okay. That was more than I bargained for, I guess. I move to strike the last part as hearsay and not responsive to the question, the description of what people at --

HEARING EXAMINER It is hearsay, but it's also not being offered to the truth of the matter asserted, so I think it's a mind state on her part so it's overruled.

Q (By Ms. Schneider) So initially at some point you did submit claims to Blue Cross Blue Shield for services to the Hopkinses with a 90808 code with a 22 modifier?

A Wait a minute. When I first started working with Bonnie --

Q Well, let's back tract, I'm just asking a very specific question. At some point early in your professional relationship with the Hopkinses did you submit claims to Blue Cross Blue Shield of Montana using the 90808 code with a 22 modifier?

A Yes, I did.

Q Okay. And were you paid for the 22 [Page 39] modifier additional time?

A No.

Q Were you ever paid for the 22 modifier that you used in relation to billing for the Hopkinses' services?

A No.

Q So after that, after you had attempted the use of the 22 modifier but were not paid then what practice did you initiate?

A Then what I did is I talked to Terry, who was a provider person --

Q And is Terry going to testify?

A Yes, I hope so.

Q Terry has been subpoenaed?

A Yes.

Q Okay.

A And asked him about this situation with the 22 modifier and why wasn't it being used for medical reasons because I had some very intense seriously mentally ill individuals who when they get into the trauma of their childhood experiences were going over time and I wanted his aid and assistance. And he said that they had a new medical director and the new medical, that he took the issue to the new medical director, the new medical director said, [Page

40] "We're not going to be using 22 modifiers because it extends it too long, it would be too hard on the client and too boring for the therapist."

Q So let me understand the periods of time that are designated for each of those billing codes, the 90804,06 08, have been developed probably nationally, do you know?

A Yes.

Q And the maximum therapy session and counseling outpatient face-to-face counseling is 80 minutes?

A But nationally the 22 modifiers put on it so that you can make it 100 minutes and that's used nationally, but the American Medical Association and the American Counseling Association and everybody's familiar with it.

Q. That's if you provide sufficient documentation in the form of your clinical records?

A Uh-huh.

Q And is that not reviewed then by medical personnel to determine whether the 22 modifier is necessary?

A Would you ask your question again, please? Something about was necessary? Oh, whether a medical person would review it?

[TR. OF PROCEEDINGS (DAY II) BEFORE BOARD
OF SOCIAL WORKERS AND PROFESSIONAL
COUNSELORS, MAY 26, 2006, pp. 76-83, 208-19]

Q. So it might drop it down to an 84 percent?

A. It's possible.

Q. Right. This exhibit -- They're one exhibit, just in two clips. When you did the March 31, 2004 letter, that was your original charges, right?

A. When you say "charges," I think that's not exactly the correct word, because we have no authority to charge or anything like that. This was a letter written to you that identified the concerns that we had found in our review.

Q. Right.

A. And it was basically -- As much as anything, it was basically a refund letter, a request for a refund.

Q. Correct. But it being a refund letter, wasn't that followed by a letter on April 29th to you requesting more information?

A. I don't have that, but I remember a letter in followup.

Q. See if there's a letter written to you.

A. Yes.

Q. It's dated what?

A. April 29, 2004.

Q. And what is the gist of that whole letter?

A. It's, to some extent, requesting additional [Page 77] information.

Q. Is that because your material in the March 31, 2004, raised other issues that were unbenounced to Dr. Clement until you raised them?

HEARING EXAMINER: Do you mean, is that what the letter indicates? He obviously doesn't know your state of mind, presumably. So are you saying, is that what the letter indicates?

MS. CLEMENT: Yeah

HEARING EXAMINER: Is that what the letter indicates, sir?

MS. CLEMENT: Can we put the letter in as an exhibit?

HEARING EXAMINER: Hold on. You asked him a question. He can answer.

A. I think, for example, it starts out and is says, "I thought the issue over my license and Dr. Barnes' supervision had been resolved earlier," so is that what your getting at?

Q. (By Ms. Clement) Is this a letter to you?

A. Uh-huh, yes.

Q. And you recognize it is a letter to you?

A. Yes.

MS. CLEMENT: Can I have this admitted now as an exhibit?

[Page 78]

HEARING EXAMINER: Do you have any objection? We have to mark it.

MS. SCHNEIDER: I believe it's already in here.

HEARING EXAMINER: It's one of yours, isn't it?

MS. SCHNEIDER: I believe it's in the materials -- What's the date on that again?

THE WITNESS: April 29, 2004.

MS SCHNEIDER: I'm sure I read that in here. But in any event, if you want to admit it, I don't have an objection.

HEARING EXAMINER: It is here, a Mary Clement letter, subpart G, to BCBS, dated April 29, 2004. It's already in evidence, so go ahead, ask your questions off of that, Ms. Clement. It's already in there. There's no need to worry about it. Go ahead and ask your questions.

MS. CLEMENT: Okay. All right.

Q. (By Ms. Clement) What is the major issue that she -- Isn't the major issue there is that she wants more information in order to respond to you?

MS SCHNEIDER: Objection, argumentative, and the document speaks for itself.

HEARING EXAMINER: Well, I don't know [Page 79] if it's argumentative, but the way to ask that question is: "Does that letter indicate to you that she wants more information?" Can you answer that question, sir?

THE WITNESS: Let me look at it.

HEARING EXAMINER: Go ahead, please.

A. Yes, it does, in a number of areas, request more information.

Q. (By Ms. Clement) Can I have that back, please?

A. Yes.

Q. That's now exhibit --

HEARING EXAMINER: It's always been in there as 1(5)(G).

MS CLEMENT: Thank you.

Q. (By Ms. Clement) Now, this material that was sent to Bruce Duenkler, then, isn't it true that all of that material and investigation was before Mary Clement had responded to your request?

A. This is dated July 28, 2004.

Q. Right.

A. I don't recall the date on that.

Q. (Indicating.)

A. This was April 29th, so your letter was sent prior to the information sent to Bruce Duenkler.

Q. True, right, got it. Okay. And your reply [Page 80] to the April 29, 2004 for additional information, when did you send that additional information?

A. I'm assuming you have my reply here.

Q. That's what I'm asking you to tell us.

A. My reply was August 12th of 2004.

Q. That's when you wrote the letter?

A. Correct

Q. So she gets it about August 18th; seven, five, six days later?

A. You did, yes.

Q. So the request for information was on April 12th, your reply was August 12th, and in the interim, you submitted all of the information without Mary Clement ever having a chance to respond to you because she's still waiting for more information; is that correct?

A. That would be correct.

Q. Thank you. And when Mary Clement did respond, is this what the materials looked like? And what is the date? Go ahead and take a few minutes to look it over.

A. It appears this is -- it appears this was originally sent, okay, this is November 30th of 2004.

Q. So November 30, 2004, she's able to get all of the documentation together to answer your concerns [Page 81] that were developed March 31, 2004?

A. Okay.

Q. When you were looking at Dr. Roger Dale Barnes and you set him up as a provider as a psychologist, when did you check his license; do you remember?

A. That's done in a different department. I didn't.

Q. Okay. Is it possible that Dr. Barnes had a psychology license to practice as a psychologist in the year 2000, and then takes medical leave such that that license would not be active when you made your investigation in 2002, 2003 or 2004?

A. I can't say it's not possible. I haven't seen any evidence of that.

Q. Did anyone contact Dr. Barnes to get a copy of his own license?

A. Again, that would be another department. I'm not aware of that.

Q. So you based some of your investigation on the investigation of others?

A. No, because I don't think that -- Our primary concern with Dr. Barnes didn't have anything to do with his specialty.

Q. But I thought you had raised the issue that [Page 82] he wasn't licensed as a psychologist.

A. I mentioned that, yes, but our primary issue was that he was not licensed in the state of Montana and not providing services in the state of Montana.

Q. But isn't it true that Blue Cross Blue Shield has many businesses throughout the United States, that a provider in another can be a supervisor for somebody else and provide those services through that?

A. If the services are provided in the state -- If there are supervising services provided in the state that the patient is treated, then that would be okay, if I understand your question right.

Q. But isn't it true that you would have never paid on his claim unless there was a setup of his number and his name being accepted by Blue Cross Blue Shield?

A. That's correct; and I was going to say, his provider ID was set up with a Tennessee address, and the claims were submitted under his name with a Tennessee address.

Q. Okay. And wasn't there a time when that got audited and Angie Furlong approved of it? Wasn't there a letter from Angie Furlong telling Dr. Barnes and Dr. Clement, you know, and straightening up that situation?

[Page 83]

A. You know, I have a copy of that letter you sent to us, I think a week and a half ago. And when I read that, it appears there's some confusion on Angie's part because -- I don't know if I have that letter. Do you have that letter?

Q. Yes, I have a copy of it. Please identify the letter to the Court with the date.

A. This is a letter dated October 19, 2001. It's address to Mary Clement in Livingston, Montana, and it's signed by Angie Furlong, who is a provider network specialist for Blue Cross Blue Shield.

The letter involves some claims that were paid in duplicate because at one point they came in under Dr. Barnes's name, and at another point they came in under Mary Clement's name, or the duplicate logic in out system didn't catch those as duplicate claims because of the different provider, so they were paid twice.

And what I was referencing was the fact that in Angie's letter, it says we reversed some of the billed services of Dr. Barnes and paid you under a misunderstanding that he was not in the office for the visits. Later we found that Dr. Barnes was here in

Montana observing your services and, in that case, claims should have been paid to him.

[Page 208]

Q. Isn't there a PACT model here in Helena?

A. I understand there is. It's connected to the Great Falls one.

Q. So Great Falls has branches here in Helena?

A. The Golden Triangle Community Mental Health Center has an office now in Helena. That just happened a number of years ago.

Q. Okay, now talk to us more about how it works in Helena when you were -- I mean, how this homebuilder's model was being used when you were the supervisor and dealing in training people.

A. Okay. Taking an interest in basic needs, the families that were in crisis, especially with abuse and neglect of children, were those that generally had not gotten their basic needs met. There became a strong understanding of this, and the contract the State had with the Golden Triangle during the time I was there was that these basic needs would get reflected in therapy in terms of some pretty unorthodox types of therapy with these families.

[Page 209]

One is the recognition of need for money with low-income, disabled, or indigent families. So the contract usually included what they would call hard services or concrete services, an amount of money that was allowed to be spent on these families. the average amount for each family was \$200 at that point, and some families you didn't need anything for and some you may have \$500.

I was interested in some of the statements and the questions by Lorraine, because the money was deliberately given in certain ways. A family couldn't keep the family employed if the car was broken down, for instance, so we might pay for the repair of the car. We did all kinds of interesting things in terms of my experience with that. We found goat milk for a child that was not doing well with regular milk. We bought inexpensive furniture from Salvation Army, and the homebuilders put out a book about their model called "Keeping Families Together, the Homebuilder's Model," in which they show how well-researched, even in the beginning of these programs --

Q. So they researched the effectiveness?

A They did, and they found it to be highly effective. But I wanted to mention that one of the reasons I believe that it was effective was because of [Page 210] the ability for the therapist to use money to provide certain services.

One research study showed a list of hard services that were used with families, and this was one

case researched and printed in the handbook, "The Homebuilder's Model." What you'll see are things like, provide transportation, help clients find a job, provide recreational activities, do housework, cleaning with the client.

I had done some wall-cleaning, I had done solicitation for some cleaning people sometimes and paid for it out of our program. I gave financial assistance to clients on occasion if there was diapers needed and there was no other source. I had what's called a treasure box for children. When I would go to a family's home, I usually would bring donuts or something to eat as part of the realization that the most important thing was the bond and relationship, and my treasure box was there for children. If they were willing to work in a family setting, they would get a draw from a treasure box. What I did is I stacked it with a lot of \$1 dollar-store things, and it was very effective in terms of children wanting to relate in therapy.

You'll see here how many cases out of 48, I [Page 211] believe, no 86 -- no I'm sorry.

Q. Yeah, 86.

A. Okay, yes, 86 cases. It will tell you how many numbers had certain things given for these concrete services.

Q. So when Mary is in the house washing dishes with Bonnie, is she also doing counseling?

A. Oh, I have to show --

HEARING EXAMINER: Answer that question.

A. To answer that question, yes, but it is --

HEARING EXAMINER: Next question. She answered it.

Q. (By Ms. Clement) You answered it "yes"?

A. Yes.

Q. Can counseling also occur in other places?

A. Yes. I think probably one time a client came into the office who was part of our family-based services program, because so many of these people had histories of difficulties with therapists or with Department of Family Services or other agencies, and when you walk into someone's home, you walk into their world, and your assessments are highly reliable in that context.

The difficulty with the homebuilder's model [Page 212] is getting people to do it. It takes a certain amount of maturity, a willingness to do hard work that you wouldn't have to do in an office. So the burnout rate is something under two years, but it's been shown to be extremely effective.

They expected, by contract, somewhere around 85 percent success rate in keeping the family together and keeping the children from having to be placed in foster care or hospitalization.

Q. In the home, then, are you also doing life-survival skills?

A. You're looking at basic needs, and when there's life-survival things needed, yes, you're teaching them.

Q. So taking bonnie to a used furniture store so that she could see how she could buy her own mattress, is that a life skill, are we showing here a life skill?

A. It definitely is, it is highly recommended in terms of forming the appropriate bond. There was research on different kinds of therapy to find out what was effective. Wouldn't we all like to know what works the best? And they had humanistic and behavioral and cognitive kinds of therapy, and so on.

Results of that study was that all the therapies had some success, but the key, the key to [Page 213] whether success occurred in therapy, was the relationship between the therapist and the client.

So many of these things that you do, like washing dishes with them, washing walls, helping with the painting, or paying for it, is also causing a closer bond, and therefore, they will take from you more of your guidance in different directions.

Q. Good. What about a counselor that reveals something personal about herself to a client? What's the research on that as its effectiveness?

A. Okay, we used to -- and the reason I'm saying "used to" is because Montana, in general, many of our agencies really need to be educated about what's going on in therapy. I'm sorry, would you ask that again?

Q. Yes. The claim has been raised that a counselor who reveals anything personal, any personal problem she's having, any distress she's in, is violating a boundary issue. What's the research on that? We call it self-revealing. What's the research, say, when a counselor self-reveals in terms of a relationship with a client?

A. Our world grew out of psychotherapy with Freud. Psychotherapy that was done, psychoanalysis with him believed that the doctor or the therapist was a blank screen for which the patient, then, would [Page 214] project all of the neuroses and psychoses. So we came out of a system that believed that you don't reveal yourself, okay?

More recently, and I just read an article recently, there was some research done with this to find out whether therapy worked better when a therapist was open about their own experiences in life or whether they weren't, and they definitely found that therapy was more effective when the therapist was free to reveal themselves.

Now, this is not exactly welcomed by many therapists because they would like to keep a distance. they don't want to go through the burdens of having a relationship that involved, maybe, questions from the client about their lives or whatever. So this is one of the reasons I feel that it takes a certain amount of maturity to do these cutting-edge kind of therapies.

Q. But in this particular situation, when you reveal something, it doesn't necessarily mean you're asking the client to solve your problem, does it?

A. Ofcourse not, and you would certainly not allow that.

So in this kind of work, when you look at boundaries, because I grew out of a system of family systems therapy, where we're working with boundaries [Page 215] all the time, there needs to be strong boundaries, and I worked with families over and over with this, between the parents and children, between the family and outside world.

So you have loosened a certain amount of boundaries, but you certainly don't have a pint at which -- You're not calling a halt to it.

Now, even though it's recommended that your client can call you anytime in a 24-hour period, I have to say that I'm confrontive enough with my clients and successful enough that almost all the time they would not abuse that. In fact, I've never had a client abuse calling me when they've had my phone number.

Q. When you were talking about hard services, you were talking about hard services or concrete services being provided by the agency, do you know of any prohibition against a counselor providing some of those services out of their own pocket?

A. There isn't, and this is what's wrong with our state system right now, is that they're not giving us information ahead of time. They're not saying, "You can bill for this, but you can't bill for that." They're saying, "You can do this therapy but you can't do that therapy."

We get no guidance and direction, and [Page 216] therefore, we find our way, and I believe, going right into private practice probably sent you onto a mine field of disaster because there was not guidance given.

We get other guidance from other insurance companies, but like our state system, Blue Cross does not give hardly any guidance. They just ask you to do your thing and then they'll either reject it or accept it.

Q. One of the other issues that was raised was about the mule or the donkey, buying food for the mule.

A. Yes. When I read that, I thought: How creative, how creative to see that by feeding an animal, you could get a depressed patient out of bed. That sounds like some of the insightful things that some of those I've trained in family services would do.

I had a case, this is very similar, and I wanted you to see this in terms of boundaries. A military family in Great Falls where the wife was the mute, psychologically mute, she didn't want to talk to anyone who might represent a system or a mental health center, whatever. I never thought that was not going to change, but what happened is they had a 100 percent [Page 217] silver Persian cat, and the cat was quite pregnant when I first started working with this family.

One day I came and the babies were born, and a few days later I came to the home and the cat's abdomen had opened up, so we immediately took this family -- the mother, her child, and the cat -- to the vet. We paid for the vet, and not only did we pay for the vet, but how are we going to have this one mother feeding six or seven babies around the clock with a bottle?

So I took two of those kittens back to my place, and I fed them around the clock with a bottle, and I still have them. They're beautiful black cats, so the mother had teamed up with some pet in the alley, maybe, and I still have those with me, and it happened at least eight years ago.

Now, is that a breakdown in boundaries? I'm saying, from a traditional understanding of psychotherapy, that would be a breakdown in boundaries.

In this case, that woman began to talk. I had found a need that needed to be satisfied in an area that

was psychologically rewarding enough to the mother that we now had a relationship.

Q. Talking about cats, if cats aren't cared for, [Page 218] can they be dirty and messy and nasty, since you have at least two?

A. I have more than that. I even have one I took from another family because the children, the young children, were abusing the cat, and the mother knew, and I told er, "You cannot allow this any further." I still have that cat. But the question was—

HEARING EXAMINER: The question is obvious.

A. —cats can be dirty?

HEARING EXAMINER: The question is obvious. Let's move on.

A. Cats are generally dirty. Cats are generally dirty, and I have to say I am a cat person, so I do have a lot of research on that. Cats can be dirty, but they primarily want to be clean. It's the people that are not clean.

Q. (By Ms. Clement) So a person who is not cleaning out the cat litter box and the clothes are being urinated on and the papers on the floor are being urinated on, does that become a health risk in a house that needs to be cleaned up?

A. Absolutely. I had one family that had a pig, that had baby pigs on their carpet.

[Page 219]

HEARING EXAMINER: I'm sorry, I understand this, and this is -- There's no dispute about that. I just don't want the explanations. She's not an expert on that. You don't need an expert on that. Stick to the reason you got her here to testify today.

MS. CLEMENT: I'm still there, okay.

Q. (By Ms. Clement) Are you familiar with the term "carryover" for billing?

A. Yes.

Q. What does that mean to you?

A. That means that you would carry over time that was beyond 75 to 80 minutes, for instance, which is the limitation we have on an 80808 -- no 90808, and so some counselors will -- One woman told me, I quote --

MS. SCHNEIDER: Objection, hearsay.

HEARING EXAMINER: It's hearsay. That would be sustained.

Q. (By Ms Clement) Is it the usual and -- In your estimation, is it the usual and customary practice in the field for counselors?

[TR. OF PROCEEDINGS BEFORE SOCIAL WORK
EXAMINERS & PROFESSIONAL COUNSELORS,
MAY 2, 2007, pp. 20-23]

[Page 20]

So in the hearing what I'm talking about is that with Dr. Olson, when I tried to cross-examine him, he stayed behind the assertion of privileges and he hid behind the client's privilege four times and then used his attorney's name twice. So for six important questions, I didn't even get adequate information from him because he didn't permit it.

The second thing that you have to understand is that on the MMPI, when I submitted it with all the materials I put in, I hoped that somebody on the Screening Panel would understand that her scores are extremely severe, which means that she's going to embellish and make things up.

Dr. Olson only continued to use a medical model, pushing all of her needs and her demands onto a counselor, and that's the same thing that came out with Hillegass. So when you look at some of these things --

Okay, all right. Now, the next thing you have to understand is that in the summer, I billed Blue Cross and Blue Shield for the counseling that was done when I went to the home to visit, find out where they [Page 21] were, what was happening, what arguments they had the night before, handled whatever was going on.

Going to Staples or going to get computer supplies or going to get paint is a life skill. It's therapeutic, but it wasn't billed to Blue Cross and Blue Shield because they had already gotten billed for that amount of time for that day, and the Hearing Officer didn't understand that.

MR. HARRIS: Could you cite us anyplace in the record that supports your contention that it is therapeutic? Have you had expert testimony that indicated that those things were therapeutic?

MS. CLEMENT: Yes, I did. There were three places that it was done. It was done by Mrs. Emily Olson, by Brenda Wares, and by Dr. Roger Dale Barnes. And not only that, but the MMPI itself said that you should have -- that because she was a borderline personality disorder, that the regular psychotherapy -- insight psychotherapy techniques would not work as well with her and that you needed to do life-skill management kinds of things.

The other thing is that one of the things that I think the Hearing Officer really failed to look at was Barbara Erickson's testimony that dealt with the fact that B.H. was a difficult person to keep in [Page 22] therapy, because that's part of the symptoms of being a borderline personality disordered person.

The other thing is that, when I started working in 2000, 2001 and 2002, the Hearing Officer failed to realize that that time was different from the present time, and it's Carrie Manska's testimony that said that the use of the 22 modifier was new. It was new to the

State of Montana. It was new to Blue Cross and Blue Shield.

The State of Montana, even in Medicaid, had shifted to CPT codes, and what people were doing is, if somebody goes over a 90804, you use a 90806, which is for 45 minutes. If a person goes over a 90806, you use a 90808, which is for 75 to 80 minutes.

But what happens when that person goes over the 90808? I was trained in Tennessee to use a 22 modifier. When I came here, I found that I was, as Terry Manska said, I was one of the very first to even ask questions about the 22 modifier, and that when I talked with them and had meetings with them over a year period, it was still difficult for them to figure out how to use a 22.

They said that a 22 modifier was too tiring, it was difficult to keep the attention of a client, and it was too difficult for the therapist, which meant [Page 23] that there were a lot of counselors who fell back on doing their standard practice, which is called carryover.

So I was told by some people that what you do is you take the time that a person does and do it to the next day.

CHAIRPERSON MEADOR: Did you claim that was a practice that was approved by Blue Cross Blue Shield, the carryover practice?

MS. CLEMENT: That's a practice that counselors do; and some of the other insurance companies that I bill to, they'll say not to do it if you do it two times in a week because it violates another rule. So different insurance companies do different things.

MR. HARRIS: Whose testimony supports that statement?

MS. CLEMENT: It was my testimony on Tricare.

CHAIRPERSON MEADOR: You have five minutes remaining. This is in addition to your 30. If you'd like to reserve it for rebuttal, you're welcome to.

[TR. OF PROCEEDINGS BEFORE THE BOARD OF
SOCIAL WORK EXAMINERS AND PROFESSIONAL
COUNSELORS, Aug. 17 and 18, 2006, pp.113-16]

[Page 113]

Q Okay. Give us an example of what a dual relationship might look like?

A Dual relationship would be if you as a professional started taking phone calls as a friend to the client and not allowing it to be know that it's a therapy process. then you are relaxing your boundaries as the professional and the individual has no idea that the counselor is acting as a client but more as a friend.

Q Aren't dual relationships where you -- where you take things out of therapy into a personal realm that creates a conflict of interest? Isn't that how it's sometimes defined?

A That is the best definition of it.

Q And isn't it true that dual relationships are permitted but they are required to have more supervision such as a person being a teacher, the client is a student of the teacher, and then the student is also a client of the counselor/teacher?

A That's an accurate statement that at least another professional is involved.

Q Okay. Was there a dual relationship when I asked Bonnie what color she might want to

have for the outside of a new house I was building in Tennessee? Would that be an [Page 114] example of a dual relationship?

A I cannot see how because it would have no impact on her whatsoever; it's your house.

Q Okay. When a client calls a counselor and they've been in a counselor relationship and the client tells the counselor that she's tried to commit suicide and says this over the phone, would that be a dual relationship?

A No. You are required to if you've been informed that the person is thinking about or intending suicide to do therapy in a patchwork manner as best as possible and try to obtain a suicide contract, prevention contract, with the individual before the end of the phone session.

Q Okay. But phone counseling -- counseling can occur over the phone; true?

A Yes, that's extensively how we did it at the Guidance Center for over three years.

Q Okay. What are classifications?

A Classifications are that that is defined by the Diagnostic Statistical Manual depending on which version that you're using. The IV was the one I was most commonly know with.

Q So even though it has specific classifications, they still work on it and add new information and new research to it; true?

A That is correct. The first one was the DMS and [Page 115] we're to the DSM IV-A at this point in time.

Q What are the general characteristics of the borderline personality disorder accepted in the profession.

A If you'll allow me, I'll go to that diagnosis directly. It would be page 650 in the DSM IV. Okay. There are primary -- well, that's in the sleep disorders. Let me go back one more time here. 684. Okay. There are several diagnostic criteria on the borderline which includes intellectual functioning, their ability to manipulate their situation regarding the professional and many examples or most borderlines want to outsmart the professional or prove to themselves that they're smarter than the professional. They're controlling in the process. Excuse me one more minute here. There's one thing this thing is not giving me. It's a primary personality disorder and it involves multiple issues. That's the reason why I'm wanting to go to the manual itself.

Q Dr. Barnes, you have had over 30 years of experience with these borderline personality disorders?

A I have.

Q So why don't you just --

A If they're willing to accept that I'll give my --

HEARING OFFICER HATCHETT: Dr. Barnes, excuse me for a second. Why don't you ask your questions and I'm sure if there's objections they'll be raised.

[Page 116]

BY MS. CLEMENT:

Q Okay. When you talked about borderline personality disorder as part of a personality disorder, what are the most difficult ones to identify and treat of the personality disorders?

A Psychotherapy, sociopathology, borderline bipolar disorder, post traumatic stress disorder. Those are generally more difficult to treat.

Q Why is it so difficult to identify the borderline personality disorder?

A Without the use of a test, i.e. the MMPI, the borderline personality disorder can get -- can show itself such as antisocial personality disorder. It can be expressed even into bipolar disorder because there are so many features that are similar in each of those diagnosis. They have difficulty in forming friendships because their pathology is to lie, to manipulate, to control, to gain the upper hand in any way that they can.

Q Go ahead. Keep going?

[TR. OF PROCEEDINGS (DAY I) BEFORE BOARD
OF SOCIAL WORKERS AND PROFESSIONAL
COUNSELORS, MAY 25, 2006, pp. 61-64]

[Page 61]

A Well there are several that you can use.

Q What were you using, not what can you use, what were you using?

A Reality therapy, reality therapy. I was also using Gestalt. I was also using behavior modification, when you wash a dish and you hand it to her to dry, she gets a reward. I was also using supportive where you use reflective listening, you helped each person get their needs met, they get listened to and you create a communication system between these two that they've never had before.

Q So are these modalities also used by you in your office when you see a client there?

A Well, behavior modifications can be used most places, but if you've got the dirt in the home, that's where you use it.

Q So I guess my question again was do you use these kind of modalities in your office practice when you're not seeing clients in the home?

A They can be used both in the home and in the office.

Q Thank you. What's the homebuilder's [Page 62] model?

A The homebuilder's model is intensely working with clients in a shorter period of time, like six to eight weeks in which you're going into the home and dealing with what is the real issues behind everything. Some clients can come in to you in the office and within 45 minutes they have hoodwinked you enough, gotten services and you haven't done anything to help them because they're able to control themselves and the situation so well that they hide what is the real problem. So when you --

Q So you're better able to control them not hoodwinking you in their home as opposed to your turf?

A Because in their home you begin to see how they really act with each other.

Q So let's get back to the question, if we could, and stay focused on the question. What is the homebuilder's model?

A So the homebuilder's model is just like an intense probation, it's the idea of working with a family to preserve the, helping them to deal with their problems in ways that they have never learned how to do, if they knew better they would do better, [Page 63] they can't so you're there helping them deal with what's going on, what are the crises, so that they quit creating crises and they're less dangerous to themselves and others.

Q Where, if at all, were you trained in the application of the homebuilder's model?

A I worked for Child Protective Services as part of my social work degree.

Q And Child Protective Services in what location and what year, approximately?

A Richland, Virginia and it was probably '86, '87, somewhere in there. Don't quote me on it but somewhere in there.

Q Okay, correct me if I'm wrong, did you not indicate previously that you applied the homebuilder's model in Akron, Ohio when you worked for the City of Akron?

A The homebuilder's model didn't just like a mushroom shoot up in 1974 and was developed out of Michigan, some of its concepts have always been applied. One of the concepts of hard services and concrete services is what I was talking about in Akron, Ohio. In Akron, Ohio we were urban renewal and in urban renewal what we wanted to do was move people from blighted areas and we wanted to move [Page 64] them to safe, sanitary housing and we wanted to make sure the blight didn't go with them.

Q Okay, so let me stop you there. When you worked in Akron, Ohio with the urban renewal program were you a professional counselor at that time?

A I was -- I had a master's degree in sociology.

Q Were you a professional counselor at that time?

A I wasn't licensed as a professional counselor.

Q Did you have a degree in counseling?

A I had some courses of counseling but I was, my job title was relocation technician.

Q So that was in '74?

A No. Let me see. Oh, wow. When was I in Akron, Ohio? Akron Ohio was after my master's degree, that would have been in '67 or '68.

Q So in 1967 or '68 you were using these principles that you're describing under the homebuilder's model in your job in the urban renewal program, correct?